
Digitized by the Internet Archive
in 2011

http://www.archive.org/details/firstthirdpartof03grea

Aprill 3° 15° 95.

Pd mr Clarke for thes 3 bks of Crokes Reports & for 3 d. [illegible] q
2 bks of ye same Authors Reports ——— 2: 9: =

Lmo Gardiner



R: White sculpsit.

John Quincy Adams 1790.
George Washington Adams 1825.

John Adams 1760.

THE THIRD PART { Though first publish't }

OF THE

REPORTS

OF

Sr George Croke Kt.

Late one of the Justices of the Court

OF

KINGS-BENCH,

And formerly one of the Justices of the Court of

COMMON-BENCH;

OF SUCH

SELECT CASES as were Adjudged in the said Courts, during the first Sixteen Years Reign of King CHARLES the First.

Collected and Written in French *by Himself; Revised and Published in* English

By Sir HARBOTTLE GRIMSTON Baronet, Master of the *ROLLS.*

The Third Impression, carefully Corrected, with the Addition of many Thousand of References never before Printed.

LONDON,

Printed by *W. Rawlins, S. Roycroft,* and *H. Sawbridge,* Assigns of *Richard* and *Edward Atkins* Esquires;

And are to be Sold by *H. Twyford, F. Tyton, H. Herringman, J. Starkey, T. Basset, S. Heyrick, J. Wright, M. Pitt, C. Wilkinson, T. Dring, C. Harper, T. Sawbridge, J. Place,* and *G. Collins.* 1683.

1652
2

ADAMS92-17
no.3

To the King's most Excellent Majesty,

CHARLES II.

By the Grace of God,

King of Great *Britain*, *France*, and *Ireland*,
Defender of the Faith, &c.

Most Gracious Soveraign,



Ith that Duty and Humility which becomes a Loyal and Obedient Subject, I offer up unto Your Royal Patronage, the learned Works of a Prudent, Grave and Pious Judge, The Author deceased, and now with God; when he left the World, he left with me these precious Fruits of his Travel

in the Common Laws of England; *and it hath been my care, to ſend them abroad for the publick good: But it was firſt in my purpoſe, to dedicate them to your Sacred Majeſty (the grand Mecœnas of the Common Law,) aſſuring my ſelf, the uſefulneſs to be ſuch, and your Majeſties diſpoſition ſo Princely, that you would not deny to receive them with a gracious Hand: But unhappily hindered of my purpoſe (to mine unſpeakable grief) by the extream difficulty of publick Addreſs to your Majeſties Sacred Perſon, divided from your good Subjects, by the cruel, wicked, bloody, and deſperate practices of horrid Intruders and Uſurpers, inforced to yield to the neceſſity of the times, I ſent forth the two former Works of this eminent Judge, with a Preface only, to encourage Gentlemen in the Study of that Law, which I conceived was the beſt way, not only to evidence your Majeſties moſt juſt, undoubted, and hereditary Right to your three Imperial Crowns, of your now-again famous and flouriſhing Kingdoms; but likewiſe to reſtore your Majeſty to your Prerogative Royal, and to give you that Supremacy which is due to your Soveraign Authority.*

And

And now thoſe black and bloody Clouds are happily diſpelled by the miraculous Brightneſs of Your Majeſties preſence, To whom ſhould I dedicate the Works of this learned Judge, but to Your Royal Goodneſs, to whoſe Service I have devoted my Tongue, and Pen, and Heart, and all the Offices of my life; and upon whom, not only the Eyes, and Hearts, and Hopes of all Your own loyal Subjects (delighted to ſee the Moderation of Your Government,) but of all the Proteſtant World, are fixed, (as the true Heir, and real Inheritor of Your Royal Fathers Graces and Vertues, our late King of ever bleſſed Memory, and now moſt glorious Saint *and* Martyr) *whoſe Divine and Heavenly Inſtructions, together with the Gifts of Nature and Grace, wherewith God hath richly ſtored Your Princely Mind, calls You to great Matters, and promiſeth great Effects, and fills with great Hopes, all thoſe that fear God; who eſteem You as a Plant of Gods own ſetting, which he dreſſeth with his own Hand, watereth with his Grace, and daily fructifieth to his Glory.*

Royal Sir,

The Reſtitution and Preſervation of the Law, Juſtice, Government, and the happy Policy of our Civil State (next under God) is due to Your ſelf, being to this Nation another Charlemaine; *for as it was his Impreſe upon the Reverſe of his Coin* Decem Præceptorum cuſtos Carolus Magnus;) *ſo may it truly (next under* Defenſor Fidei) *be engraven upon the Circle of Your Crown* (Legis Anglicanæ cuſtos Carolus Secundus.)

Which Law of England *is nothing elſe but an artificial Perfection of Reaſon; and therefore my Lord* Coke *tells us, If all the Reaſon that is diſperſed into ſo many ſeveral Heads, were united into one, yet he could not make ſuch a Law as the Law of* England *is, becauſe by many ſucceſſions of Ages it hath been fined and refined, by an infinite number of grave and wiſe Men, as now by the learned Labours of this Reverend Judge, and by long experience is grown to ſuch perfection for the Government of this Realm, as the old Rule may juſtly be verified of it,* Neminem oportet eſſe ſapientiorem legibus; *No man out of his own private*

Co. Lit. 97. 8. Pref. 1 Cr. 1. a.

private Reaſon, ought to be wiſer then the Law which is the perfection of Reaſon.

Neither is this Law for Prince and People only as they be in a Body Politick, but alſo for the ſingular benefit of the Church of God, the Rights and Liberties whereof, the Common Law maintaineth inviolably, being as Judge Forteſcue *defineth the ſame,* Sanctio ſancta jubens honeſta, prohibenſque contraria. *The ſame in effect which* Cicero *ſaith in his ſecond Book* De Natura Deorum, Lex eſt recti præceptio, pravi eſt depulſio. *Wherefore Religion and the Law do ſtand together, do mutually uphold each other, and are concentred in their original, and end, they both come from God, and tend to God. And as Religion, ſo the Law was given,* Ut cives faciat bonos, *ſaith the Philoſopher, And therefore the Law in a Chriſtian State is not only convenient, but neceſſary, that no State can ſtand and flouriſh without it. Hence it is, that where Religion doth find a due regard, a conſcientious practice, and the Law a willing ſubmiſſion, and a chearful obedience; there, if any where in the World, the Prince will be glorious, and the People happy.*

Excellent

Excellent Sovereign,

Your weighty Affairs do call me off, and command brevity; I will yield obedience in both, but muſt firſt humbly crave Your pardon in uſing Your moſt Illuſtrious Name in the Dedication of theſe Books. It hath been no unuſual thing to dedicate to Kings, the Writings of famous Men; nor will it be inglorious to Your Highneſs to vouchſafe theſe Your Patronage; for whilſt You countenance worth and worthy men, Your Vertue will contend with your Fortune, and your Goodneſs bear up an equal ballance with your Greatneſs; and then ſhall the deceaſed Author, in theſe deſerving Works of his, live before you, who for his meer merits was made a Judge of this Realm by your Royal Father, according to that ancient and honourable rule and way of Law-Preferment mentioned by Fleta, Nec Prece, nec Pretio, nec Præmio: *And having skilfully and faithfully ſerved in that place above Sixteen years, and by his exceeding care and pains in that ſervice, worn out his weak and aged Body, humbly petitioned His Majeſty, that he might render up the Office He gave him, and wholly retire into the Country.*

Pref. 1. Cr. 5. a. 1 Cr. 1. Inſt. en temps Jac.

To

To which Petition, your Majeſties Royal Father gave a moſt gracious Anſwer, mentioned at large in my Preface to the Third Part of this worthy Judges Reports, though firſt Printed, which cannot be expreſſed but in his own words, without injury to his incomparable ſtile, viz.

To the end all Our loving Subjects, who have and ſhall faithfully ſerve Us, (as We declare this Our Servant hath done) may know, That as we ſhall ever expect, much leſs require or exact from them performances beyond what their Healths and Years ſhall enable them; ſo We ſhall not diſmiſs them without an Approbation of their Service, when We ſhall find they deſerved it, much leſs expoſe them in their old Age to neglect, &c. *And thereupon he continued him ſtill Judge of the* Kings Bench, *and gave him the like Allowance and Fee he paid to the reſt of the Judges, till a* Certiorare *came from the great Judge of Heaven and Earth, to remove him from a Humane Bench of Law, to a Heavenly Throne of Glory.*

And

And now I beſeech Your Majeſty, as the juſt payment of a due Debt to the Honourable Aſhes of this worthy Judge, my dear Father-in-law; and as the earneſt of a far greater, to the Father of our Country, Your Sacred Majeſty, to accept this poor Oblation from the Heart and Hands of him, who makes it his daily Prayers, That You may live long, and triumphantly Reign, and that Your Scepter may like Aarons *Rod bud and bloſſom, and be an eternal Teſtimony againſt all Rebels:*

Your Majeſties

moſt Loyal Subject

and Obedient Servant,

Harbottle Grinſton.

WE all knowing the great Learning, Wiſdom and Integrity of the Author, Do (for the Common good) Allow and Approve the Publiſhing of this Book, in the ſame Letter and Dialect as now is Printed.

Robert Foſter
Orl: Bridgman
Matthew Hale
Thomas Malet
Robert Hyde
Edward Atkins
Thomas Twiſden
Thomas Tyrrill
Chr: Turner
Samuel Browne
Wad. Wyndham.

TO

THE STUDENTS

OF THE

COMMON-LAWS

OF

ENGLAND.

REASON is the life of the Law, Co. Inſtit. 97.b. 394. b. *ſaith that grave Father and Sage thereof, Sir* Edward Coke; Nay, the Common Law it ſelf is nothing but learned Reaſon, or the perfection of Reaſon, gotten by much ſtudy and obſervation; which by many ſucceſſion of Ages hath been fined and refined by an infinite number of grave and learned men, and, by long experience, grown to ſuch a perfection for the government of this Realm, as the old rule may be juſtly verified of it; No man of his own private reaſon Pref. 3. Cr. 14.b ought to be wiſer than the Law. *This Law, as ſaith the ſame Author, conſiſteth of three parts:* Firſt, on Reports and judicial Records: Secondly, on Statutes contained in Acts and Records of Parliament; And thirdly on the common Cuſtomes of the Realm, grounded upon Reaſon, and uſed time out of mind, &c *The Conſtruction and Explanation of all which belongs to the Judges of the Realm* (* *For* though the Law is the Rule, yet [a].

Cok. Inſt. 344. a. Optima Legum & conſuetudinis Interpres eſt res perpetua ſimiliter Judicata.

* Cok. Inſt. 130. a.

yet in it ſelf it is but mute; The Judge is *Lex loquens*) *whoſe Judgments and Reaſons given in Court, leſt they ſhould vaniſh with the breath that uttered them, or being written in the memory of the hearers only, ſhould be more frail and fluid than humane nature it ſelf,* The wiſdom of our former Kings appointed four Reporters, to commit to writing, and truly to deliver, as well the words ſpoken, as the Judgments and Reaſons thereupon given in our Courts at *Weſtminſter*, who were choſen men, and conferred altogether at the making and ſetting forth any Book of Reports; which Book in reſpect of the number of the Reporters and their approved learning, carried great credit, as juſtly it deſerved, *ſaith Mr.* Plowden. *Hence it is, That all our Year-books of Law-Reports, from the beginning of the Reign of King* Edward *the third, until the latter end of King* Henry *the eighth, received their being, and continue their repute with us to this preſent. If we have ſince failed in the number of the Perſons reporting, it hath been amply recompenced in the Grandure and Authority of one ſingle Author, Sir* James Dyer *chief Juſtice of the Common Pleas, by whoſe great learning and aſſiduous ſtudy, the ſaid Judgments and Law-Reſolutions have been tranſmitted and perpetuated until the twenty fourth year of the reign of the late Q.* Elizabeth; *ſince when there hath not been any continuation or dependance of term or time in the Lord* Cokes *Reports, or in any other approved Law-Author, to this preſent, whereby a conſtant*

Plowd. Prologue to his Commentaries. Cok. Preface to the third Report, pag. 7. Hobert Rep. fol. 252.

Series

Series or Diary of our Law reſolutions, in our Courts at Weſtminſter, *might have been propagated unto us. By which* Interſtitium *in theſe licentious times,* Non tam Reſcripta, & Judicum ſcita, quam propudia & ſæverioris literaturæ improperia immodicè ſcaturiunt. *A multitude of flying Reports (whoſe Authors are as uncertain as the times when taken, and the cauſes and reaſons of the Judgments as obſcure, as by whom judged) have of late ſurreptitiouſly crept forth; whereby, inſtead of that plentiful and profitable increaſe, which thoſe fields (thus by a vigilant husbandman tilled) would have yielded to our Students, we have been entertained with barren and unwarranted Products.* Infœlix lolium & ſteriles avenæ, *which not only tends to the depraving the firſt grounds and reaſon of our Students at the Common Law, and the young Practitioners thereof, who by ſuch falſe Lights are miſled, and thereby their Clients Cauſes either delayed or miſcarried, and multiplicity of Law Suits rather cheriſhed then ſuppreſſed: But alſo to the contempt of our Common-law it ſelf, and of divers our former grave and learned Juſtices and Profeſſors thereof, whoſe honoured and reverend names have in ſome of the ſaid Books been abuſed and invocated to patronize the indigeſted crudities of thoſe Plagiaries: The Wiſdom, Gravity, and Juſtice of our preſent Juſtices, not deeming nor deigning them the leaſt approbation or countenance in any their Courts, purſuing therein the judgment and practice of the Reverend Sir* Henry Hobert, *who (when Serjeant* Henden,

Henden, Termin. Mich. 20 Jac. *at the* Common-*Pleas Bar in* Godfry Wades *Case, vouched for authority* Dalisons *printed Reports*) *demanded of him by what warrant those Reports of* Dalisons *came in print.*

Having therefore many, or rather one continued fifty years work by me, of the summary Reports or Commentaries of that grave, pious, and learned Justice Sir George Croke *Kt* (*which he began about the time when the Lord* Dyer *ended his Reports; and is uninterruptedly continued by him* (*our Author*) *until near his decease; and*) *not willing to deprive this present Age or Posterity of so much good; fearing also left after my decease, they should be obtruded to the Publick by an incurious Law-hand, or through sordid ignorance of some others, be prostituted in the contemptible Pamphlet-dress and character of such their blind and mishapen Reports* (dignum patella operculum) *as some of our late Justices and Professors of Law are in that kind abused:* * *Whereby the very Majesty of the Law is prophaned, the authority of Reports lessened, and the matters in their Books rendred less useful to our Students. I have taken upon me the resolution and task of extracting and extricating these Reports out of their dark originals; they being written in so small and close an hand, that I may truly say they are* folia sybillina, *as difficult as excellent, and have thereunto added the several Tables and Indexes of the Names of the Cases, and the chief Matters therein contained, I would have sent them forth in*

* There be certain legal Formalities and Ceremonies peculiarly appropriated and anciently continued amongst us; so as they seem now to be essentials of the Law it self, and ought not without the supreme authority be changed or diffused: Such are those which are observed by our Author in the creation of Serjeants at Law, &c. And such I conceive are the writing of the Orders and Records of Courts, in such peculiar hands, the printing of Law Reports in their proper Letter and native Language.

in their native Idiome, the proper and peculiar phraſe of our Common-law, wherein they are ſuccinctly, ſenſibly, and fully reported, (There being many words in them ſo appropriated, as that they cannot be ſo legally expreſſed by any other word, or by any periphraſis or circumlocution) *if not otherwiſe by preſent authority inhibited: And in regard the whole work is too voluminous to be compriſed in one Book, I have according to the ancient method obſerved in our Law Reports, reduced them to the number of our Kings and Queen, in whoſe Reign taken; and as well in obſervance of the adviſe of the Lord* Coke *to the Students of our Common Law,* That they ſhould firſt read the later Reports, becauſe for the moſt part the later Reſolutions and Judgments are the ſureſt, and therefore beſt to ſeaſon them therewith at the beginning, both for the ſetling of their Judgments, and retaining them in memory, and are eaſier to be underſtood than the ancient; *As alſo for that I would in a ſeaſonable time* provocare ad vivos, *upon* Tacitus *grounds, and not improperly in his own words, it being now* ultra quindecim annos (grande mortalis ævi ſpatium) in quibus multi fortuitis caſibus interciderunt; pauci, & ut ita dixerim, non modo aliorum, ſed etiam noſtri ſuperſtites ſumus, exemptis è media vita tot annis, quibus juvenes ad ſenectutem, ſenes prope ad ipſos exactæ ætatis Terminos per ſilentium venimus: *'above 'fifteen years (a great part of mans age) wherein 'many have been waſted by uſual chances, a few 'of*

Co. Litt. 9. a. Co. lib. 4. 39. b.

Co. Lit. 249. b.

Tacitus in vitâ Julij Agric.

'*of us only remaining that have overlived, as I may*
'*ſay not only others, but alſo our ſelves, ſo many*
'*years ſubducted out of the midſt of our life, in*
'*which we proceeded in ſilence from young men to*
'*aged, from aged almoſt to the grave: In which*
ſpace the chiefeſt both at Bench and Bar have been
taken from us by death, ſome few only who were
then Anteſignani *with them, and now* primi cerii
in foro noſtro Weſtmonaſterienſi *remaining alive*
with my ſelf (who for the greateſt part of the time
in taking theſe Reports had the honour to be at the
feet of this Gamaliel) *whom I may vouch to atteſt*
with me, the candour and integrity of our Author, as
well upon the Bench, as in writing this work; where-
in he never ſought to draw to himſelf, the glory of
any argument or opinion delivered by another, but
were he at the Bar or Bench, hath faithfully ſet
down his ſaid Judgment or Opinion, and yielded him
his due commendation. I have therefore firſt pub-
liſhed the laſt part of his Reports, conſiſting of ſuch
choice Judgments and Reſolutions only wherein him-
ſelf was both Judge and Relator, who without oſten-
tation might have fitly applied that of Syracides *un-*
to himſelf, Ego ultimus evigilavi, tanquam is qui
ſpicas legit poſt meſſores, profeci benedictione Do-
mini, & tanquam vindemiator, implevi torcularis
lacum: Conſiderate, me mihi non ſoli laboraſſe,
ſed omnibus quærentibus eruditionem: '*I am a-*
Eccleſiaſticus cap. 33. verſ. 15. & 16. '*waked up laſt of all, as one that gathereth after*
'*them in the Vintage, in the bleſſing of the Lord I*
'*am increaſed, and have filled my Wine-preſs like a*
'*Grape-*

'Grape-gatherer: Behold I have not laboured for 'my ſelf alone, but for all them that ſeek knowledge. To whoſe worthy memory I think my ſelf obliged, præ-libaminis loco aliquid parentari.

This Reverend Judge Sir George Croke *was deſcended of an ancient and illuſtrious Family called* le Blount, *his Anceſtor in the time of the Civil Diſſention betwixt* York *and* Lancaſter *(as Juſtice* Markham, *taking part with K.* Edward *the fourth, was relegated during the Reign of K.* Henry *the ſixth; and as Juſtice* Forteſcue, *ſiding with* Hen. *the ſixth, abſented himſelf in the time of K.* Edw. *the fourth, ſo) being a fautor and aſſiſtant unto the houſe of* Lancaſter, *was inforced to ſubduct and conceal himſelf under the name of* Croke, *till ſuch time as K.* Henry *the ſeventh moſt happily reconciling thoſe different Titles, this our Anceſtor in his* Poſtliminium, *aſſuming his ancient name, wrote himſelf* Croke, alias Blount, *(that of* Blount *being altogether omitted by our Judges Father upon the marriage of his ſon and heir Sir* John Croke *with the daughter of Sir* Michael Blount *of* Maple Durham *in the County of* Oxon) *This* Croke alias Blount *had Iſſue Sir* John Croke *(Grandfather to our Judge) who being a Six Clerk in* Chancery, *was reſtrained marrying, until enabled by the Statute of* 14 Hen. 8. *and being in much favor with the King,* Statut. 14 H. 8. cap. 8. *was by him made one of the Maſters of* Chancery. *He took to wife the daughter of Sir* Ambroſe Cave *of* Leiceſterſhire *Knight, by whom he had Iſſue* Sir John Croke *of* Chilton *in the County of* Bucking-

ham *Kt. a man of great modeſty, charity, and piety; who in the year of Q.* Elizabeth *was by her made the firſt high Sheriff for that County divided from* Bedfordſhire: *He took to Wife* Elizabeth *the Daughter of* Alexander Unton *Eſq; and by her had Iſſue five Sons,* viz. *Sir* John Croke, Henry Croke, *our Author, Sir* George Croke, Paul-Ambroſe Croke, *and* William Croke. *Sir* John Croke, *eldeſt Son of Sir* John, *inherited his Fathers Virtues and Fortunes, and was very famous for his wiſdom, eloquence, and knowledge in our Laws: Being Speaker of the Parliament* anno 43 Eliz. *he received his* Elogium *at the end thereof from her Majeſty, That he had proceeded therein with ſuch wiſdom and diſcretion, that none before him had deſerved better. He was Recorder of* London, *and, in* Paſch. primo Jacobi Regis, *Knighted, and made Serjeant at Law; and, in* Term. Paſch. ann quinto *of the ſaid King, advanced by him to be one of his Juſtices of the then Court of* Kings Bench, *where he ſo continued until the twenty third of* January, *in the ſeventeenth year of the ſaid Kings Reign, at which time he departed this life at his houſe in* Holbourn, *leaving behind him a plentiful Eſtate and Iſſue.* Henry Croke *the ſecond Son, and* Paul-Ambroſe Croke *the fourth Son, were grave Profeſſors of the Common Law, and the laſt of them Reader of the* Inner-Temple. William Croke, *the fifth Son, was a man of an humble ſpirit, and piouſly diſpoſed, addicting himſelf wholly to a Country life.*

Sir George Croke *the third Son, and Author*

of

of this Work, was born about the ſecond year of the reign of Q. Elizabeth, *and paſſed over his infancy and tender years under the wings and care of a moſt diſcreet and loving Mother, in the exerciſe of all good qualities, giving thereby very early ſigns of his future perfection in learning: When time & diligent inſtruction had made him fit for a remove, he was ſent to* Oxford, *to improve the talent of his natural ingenuity, with the help of the Arts, and ſtudy of Philoſophy. After ſome abode there, he was again tranſplanted to the* Inner-Temple; *where he imployed the remaining part of his youth in the ſtudy of our Common Law, and was double Reader of that Houſe. Upon the twenty ninth of* June, anno 21 Jac. *he received his Writ of being Serjeant at Law, and the ſame day was Knighted, and made the Kings Serjeant: Upon the eleventh of* Febr. anno 22 Jac. *he was created one of the Juſtices of the Common Bench, and continued in that place until* Mich. Term. anno 4. Car. Reg. *at which time upon the death of that learned and grave Judge Sir* John Doderidge *he was advanced to be one of the Juſtices of the then Kings Bench; from whence I ſhall take a ſhort ſurvey of him. He was of a moſt prompt invention and apprehenſion, which was accompanied with a rare memory, by means whereof, and through his ſedulous and indefatigable induſtry, he attained to a profound Science and Judgment in the Laws of the Land, and to a ſingular intelligence of the true reaſons thereof, and principally in the forms of good pleading. He was of an univerſal and admirable* Pref. Ded. 3 Car.

experience in all other matters which concerned the Commonwealth. He heard patiently, and never ſpake but to purpoſe, and was always glad when matters were repreſented unto him truly and clearly; he had this diſcerning gift, to ſeparate the truth of the matter, from the mixture and affection of the deliverer, without giving the leaſt offence. He was reſolute and ſtedfaſt for truth; and as he deſired no imployment for vain glory; ſo he refuſed none for fear; and by his wiſdom and courage in conſcionably performing his charge, and carefully diſcharging his conſcience, and his modeſty in ſparingly ſpeaking thereof, he was without envy, though not without true glory. To ſpeak of his integrity and forbearing to take bribes, were a wrong to his virtue. In ſum, what Tacitus *ſaith of* Julius Agricola, *his wife's father, who was a Governor in our* Britain, *I may truly ſay of this* Agricola, *our reverend Judge, my wife's father,* Agricola tempore curarum, remiſſionumq; diviſa; ubi conventus ac Judicia poſcerent, gravis, intentus, ſeverus, & ſæpius miſericors; ubi officio ſatisfactum, nulla ultra poteſtatis perſona, triſtitiam & arrogantiam & avaritiam exuerat; Nec illi, quod eſt rariſſimum, aut facilitas, authoritatem, aut ſeveritas amorem, diminuit. *'That he well and diſ-*
'creetly divided the ſeaſons of his affairs and va-
'cations. In times of Audience and Judgment he
'was grave, heedful, auſtere, and yet merciful too.
'That duty performed, no face any more or ſhew of
'authority; ſevere and ſtately looks were laid apart
'in ſuch ſort, that neither his gentle and courteous

Bakers Chron. 504. E.

Tacit. in vita Agricola. Τὸ ἦθος.

'be-

'behaviour weakened the reverence, nor his severi-
'ty the love due to his person. He was of a strict life to himself, yet in conversation full of sweet deportment and affable, tender and compassionate, seeing none in distress, whom he was not ready to relieve: nor did I ever behold him do any thing more willingly than when he gave Alms. He was every way liberal, and cared for mony no further than to illustrate his vertues. He was a man of great modesty and of a most plain and single heart, of an ancient freedom and integrity of mind, esteeming it more honest to offend than to flatter, or hate. He was remarkable for hospitality, a great lover and much beloved of his Country, wherein he was a blessed peacemaker, and in those times of conflagration was more for the Bucket than Bellows, often pouring out the waters of his tears to quench those beginning flames which others did ventilate. In Religion he was devout towards God, reverent in the Church, attentive at Sermons, and constant in Family Duties. While st he lived, he was the example of the life of faith, love, and good works, to so many as were acquainted with his equal and even walkings in the ways of God, through the several turnings and occasions of his life: and though now dead, still continues to do good, being the Founder of a Chappel, which he caused to be dedicated and set apart for the Service and Worship of God, and for the ease of the Inhabitants of Studeley *(being an Hamlet and Member of* Bechley *in* Buckinghamshire, *and at least two or three miles distant from that Parish Church) as also of an*

Hospital

Hoſpital for poor People, both which he endowed with a liberal revenue. At laſt this pious and learned Judge (finding his Age and Infirmities to increaſe, and being deſirous, before he put off his decaying and declining body, to have ſome leiſure to examine his life, and to prepare for that great Day wherein all muſt render an accompt to the ſupream Judge of their Actions) was an humble ſuitor to the late King for his Writ of Eaſe, which was denied, and yet in effect granted: And for the rareneſs, I ſhall recite both Petition and Anſwer, which are as followeth, &c.

To the Kings moſt Excellent Majeſty.

The humble Petition of your Majeſties humble Servant Sir George Croke *Kt. one of the Juſtices of your Bench*

Humbly ſheweth,

THat he having by the gracious favour of Your Majeſties late Father of famous memory, and of Your Majeſty, ſerved your Majeſty, and your ſaid late Father, as a Judge of your Majeſties Court of *Common Pleas*, and of your Highneſs Court called the *Kings Bench*, above this 16 years, is now become very old, being above the age of 80 years: And by reaſon of his ſaid age and dulneſs of hearing, and other infirmities, whereby it hath pleaſed God to viſit him, he findeth himſelf diſabled any longer to do that ſervice in your Courts, which the place requireth, and he deſireth to perform; yet is deſirous to live and die in your Majeſties Favour.

His

His moſt humble ſuit is, That your Majeſty will be pleaſed to diſpence with his further attendance in any your Majeſties Courts; that ſo he may retire himſelf and expect Gods good pleaſure: And during that little remainder of his life, pray for Your Majeſties long Life and happy Reign.

George Croke.

The Kings Anſwer.

UPon the humble addreſs, by the humble Petition of Sir *George Croke* Kt. who after many years Service done both to Our deceaſed Father and Our Self, as Our ſaid Fathers Serjeant at Law, and one of his and our Judges of Our Benches at *Weſtminſter*, hath humbly beſought Us, by reaſon of the infirmity of his old Age (which diſableth him to continue to perform to Us that Service, he much deſireth to have according to his duty done) his further attendance might be by Us in Our Grace diſpenſed with; to the end all Our loving Subjects, who have, and ſhall faithfully ſerve Us (as We declare this Our Servant hath done) may know, That as We ſhall never expect, much leſs require, or exact from them performances beyond what their healths and years ſhall inable them; ſo We ſhall not diſmiſs Pref. 3 Cr. 16. a
them without an approbation of their Service, when we ſhall find they ſhall have deſerved it, much leſs expoſe them in their old Age to neglect. As Our Princely teſtimony therefore, That the ſaid

ſaid Sir *George Croke* being diſpenſed withal, proceeds from Us, at the humble requeſt of the ſaid Sir *George Croke* (which We have cauſe and do take well, that he is rather willing to acknowledge his infirmity, by his great Age occaſioned, than that by the concealing of the ſame any want of Juſtice ſhould be to Our People) and not out of any Our leaſt diſpleaſure conceived of him; do hereby declare Our Royal pleaſure, That We are graciouſly pleaſed, and do hereby diſpenſe with the ſaid Sir *Geo. Crokes* further attendance in Our ſaid Bench at *Weſtminſter*, and any Our Circuits. And as a token of Our approbation of the former good & acceptable Service, by the ſaid Sir *George Croke*, done to our deceaſed Father and Our ſelf; do yet continue him one of Our Judges of Our ſaid Bench: And hereby declare Our further will and pleaſure to be, That during his, the ſaid Sir *George Crokes* life, there ſhall be continued and paid by Us unto him, the like Fee and Fees as was to him, or is, or ſhall be by Us paid to any other Our Judges of Our ſaid Bench at *Weſtminſter*, and all Feee and Duties, ſaving the Allowance by Us to Our Judges of Our ſaid Benches for their Circuits only.

Soon after, this good Judge (having been an early laborer in the Lords husbandry, and endured the heat of the day till the eleventh hour, whereby he obtain'd the promiſed peny of this life, which Wiſdom hath in ſtore for her Children, viz. *length of days on his right hand, and on his left riches and honour) made*

an

an holy retreat to his Houſe at Waterſtoke *in* Oxfordſhire; *where, full of aſſurance that Chriſt would be unto him in death advantage, he not long after chearfully reſigned up his Soul into the hands of him that gave it. And upon his Tomb, there erected, at the charges of his virtuous Lady and Relict,* Mary, *the Daughter of Sir* Thomas Bennet *Knight, for the laſting memory of his Name, whoſe ſervice deſerved the favour of his Prince and Country, there is this Inſcription:*

Georgius Croke Eques Auratus, unus Juſticiariorum de Banco Regis, Judicio linceato & animo preſenti inſignis, veritatis hæres, Quem nec minæ nec honos allexit; Regis authoritatem & populi libertatem æqua lance libravit; Religione cordatus, Vita innocuus, manu expanſa, corde humili pauperes irrogavit; Mundum & vicit & deſeruit anno Ætatis ſuæ LXXXII. Annoq; Regis *Caroli* XVII. Annoque Domini MDCXLI.

Whereunto I ſhall ſubjoyn

-------Cui pudor, & Juſtitiæ ſoror
Incorrupta fides, nudaque veritas:
Quando ullam invenient parem?

Horat. lib. 1. Ode 24.

'-------*Unto whom both Modeſty,*
'*And Juſtice Siſter (Faith, from Scandal clear)*
'*And naked Truth: When will they find a Peer?*

Concerning the whole work it ſelf, I may, I think, and not immodeſtly, uſe the words of the Roman Preco *proclaiming the* Ludi ſeculares Venite & videte

dete quod nemo mortalium vidit aut viſurus eſt, *A work of our Law-Reports by one man taken and continued beyond a Jubile: whereof this part contains the Caſes of ſo late time, that thereby it hath the advantage of former Opinions concerning moſt of the Queres controverted in the elder Books giving a reſolution to many of them: And hath alſo clearly explained ſeveral of our late Statutes, delivered divers moſt exact Rules for pleading; and carefully ſet down all legal Formalities in the Creation of Serjeants at Law, Judges,* &c. *with other the Ceremonies and Orders of their precedency, their times of ſitting in Court, keeping of Eſſoynes, adjournment of Terms, and other ſuch ancient Rights and Uſages of our Common Law; whereby the honour and very being thereof hath been preſerved. Of all which I would reminde our Student of the obſervation, which is*
Cok. Lit. 9. a. *given him by Sir* Edward Coke, That there is no Knowledge, Caſe, or Point in Law, ſeem it of never ſo little accompt, but will ſtand him in ſtead at one time or other; and therefore, in reading, nothing to be pretermitted.

The method herein uſed is likewiſe conſiderable; not being ſtuffed with the Pleadings at large, and their many continuances, with the ſame Arguments at Bar and Bench reinforced pro & contra: *But here the Caſe is ſhortly ſtated according to the points in Law, therein to be diſcuſſed and adjudged, the reaſons plainly and ſuccinctly laid down, and yet the matter intended truly uttered, and as near as may be, in the name and words of the party who deliver'd it,*

and

and the former Authorities to warrant the ſame ſummarily vouched; ſo as the Book is (ad compendium præparatus quantumq; ratio paſſa eſt; ita moderate repreſſus, ut nec prodiga ſit in ea copia, nec damnoſa concinnitas) *already abridged, and as far as the ſubject matter will permit, equally ballanced; ſo as neither its affluenence ſhall cloy, or its conciſeneſs be a loſs to our Students. This Book alſo paſſeth in ſurety of Law, moſt of our former Reports, which were chiefly compoſed of the ſodain ſpeeches of the Juſtices, upon the motion of Caſes by the Serjeants & Counſellors at the Bar: But moſt of the Caſes herein, be matters in Law, tried upon Demurrer, or by ſpecial Verdict, containing matters in Law, which both were debated by thoſe of the Bar and Bench to the uttermoſt; and in the end allowed, or for the cauſe ſhewn, diſallowed, and whereof the Author himſelf had a Copy, ſtudied, argued, and after great deliberation, gave his Judgment or reſolution in every of them: And ſo they be moſt firm and ſure to truſt unto.*

Julius Solinus in Epiſt. Polyhiſt. inſcripta.

Plowd. Prologue to his Commentaries.

And whereas it is the advice of Sir Edw. Coke *to Students*, That they ſhould look not only to the Caſes reported; but unto the Records of the Pleadings and Judgments therein, which much confirm the credit of the Report, and the Readers ſurety of the Law. *In moſt of the Caſes here reported, the number Roll, when and where entred, is prefixed; that thereby if any ſcruple or doubt of Error ſhould be in the Report, the Student might have a ready recourſe thereunto: And herein alſo I ſhall further ſecure you, that as already before the publiſh-*

Cok. Lit. 370.a. 209, 217.

Plowd. Prologue &c.

ing hereof, most of the present Justices have had a perusal of the authentick and original Manuscript-books of these Reports, composed in their genuine language: So when the rest of them for the publick good shall either in their original, or by translation be made common, I shall with the same care and reverence, like another * Pysane letter, preserve them, as choice Monuments of his great prudence and unwearied industry that collected them; and will be ready at any time hereafter to produce them for proof or confirmation of what I have or shall publish out of them, when by the honourable Justices, or upon any important occasion, I shall be thereunto required.

I shall not need to apologize for my self in making publick these Reports, wherein I had the only propriety, by the free donation of the Reverend Author: The Work I hope will not need it. If I find this acceptable, I shall cheerfully give birth to the other volumes of this eminent Person. For as it is my comfort (that God hath vouchsafed;) so it shall be my endeavour, that I may any way (though but thus instrumentally) use my hand in the least service tending to a general good; Det Deus ut perficiam.

From my Manor House of *Gorhambury*, *May* 7. 1657.

Harbottle Grimston.

Hæc studia Adolescentiam alunt, Senectutem oblectant, Secundas res ornant, Adversis perfugium præbent, Delectant domi, Non impediunt foris, Pernoctant nobiscum, Peregrinantur, Rusticantur.

Cicero *pro Archia Poeta.*

Anno

* The Emperors from *Justinian*, who died 565. until *Lotharius* II. in the year 1125. so much neglected the body of the Civil Law, that all that time none ever professed it. But when the Emperor *Lotharius* II. took *Amalfi*, he there found an old copy of the Pandects or Digests, which as a precious Monument he gave to the *Pisans*: by reasonwhereof it was called *Litera Pisana*: From whence it hath been since translated to *Florence*, &c. and is never brought forth but with Torch-light, or other reverence. *Carin. Cron. lib. 4. fol.* 438. *Seldens Annotations upon Fortescue, fol.* 20, 21.

Anno Primo

CAROLI
REGIS.

KIng JAMES departed this life upon the Twenty ſeventh day of *March*, in the year of our Lord God 1625. By whoſe demiſe, all the Juſtices Patents became void: Whereupon King *Charles* ſignified his Pleaſure to the Lord Keeper, That all in Judicial places ſhould retain them, as before, and be new impowred; And accordingly Sir *Randolph Crew*, chief Juſtice of the *Kings Bench*, received a new Writ; And Sir *Henry Hobert*, chief Juſtice of the *Common Bench* a new Patent, and were ſworn *de novo*. The ſame day alſo Sir *Thomas Coventry*, Attorney General, and Sir *Robert Heath*, Solicitor General to the late King, had new Patents ſent them, and were again ſworn. And like Patents were made for the other Juſtices, with recital of their ſeveral places (as they were in antiquity) and of their Removes or changes. Juſtice *Jones* was ſworn one of the Juſtices of the *Kings Bench*, and my ſelf, at the ſame time, at the Lord Keepers Houſe, was ſworn (again) one of the Juſtices of the *Common Bench*; And afterwards the other Judges, as they came to *London*, took their Oaths and received their Patents; and although there had been a Proclamation made, That all the Judges might hold and execute their ſeveral Offices as formerly; yet we conceived it ſafeſt, That none of us ſhould intermeddle until we were re-Authorized by our new Patents, and ſworn anew.

Dier 165.a

Pref. 3 Cr.

This

This Vacation, Sir *John Walter*, Attorney to Prince *Charles*, before he was King, and Sir *Thomas Trevor* the ſaid Princes Solicitor, were appointed the Kings Serjeants, and Writs directed unto them retornable in *Chancery*, who thereupon, in the Vacation, appeared before the Lord Keeper at his Houſe in *Weſtminſter*, and there took the Oath for Serjeants, and then alſo ſworn the Kings Serjeants, and their Patents there delivered them. Afterwards Sir *Henry Yelverton* received a Writ to be Serjeant, retornable in *Chancery* the fourth day of *May* (which was the firſt day of the Term) with a Warrant alſo to be one of the Juſtices of the *Common Bench*, and thereupon he made ſuit to the chief Juſtice, That he might have his Robes and Coyfe put upon him in the Treaſury of the *Common Bench*, and be diſpenſed with for returning in his party-coloured Robes from *Serjeants-Inn* to *Weſtminſter*, as the manner is of new Serjeants: Upon this occaſion all the Juſtices and Barons met at *Serjeants-Inn*, by appointment of the chief Juſtice, where Sir *Henry Yelverton* then ſhewing the reaſonableneſs of his requeſt (becauſe by the ſuddenneſs of his Calling he was unprovided for the ſolemnities) cited a Preſident, *viz.* That Sir *Edward Coke* being Kings Attorney; was made Serjeant and chief Juſtice of the *Common Pleas*, and ſworn in *Chancery* the ſame day, and then his Robes and Coyfe being put on in the Treaſury of the *Common Bench*, by Sir *John Popham* chief Juſtice, and by Sir *Thomas Flemming* chief Baron, he was led in his party Robes to the *Common Bench* Bar to make his Count, and there took the Oath of chief Juſtice all in one day. And he likewiſe deſired, that ſo it might be done to him, but all the Juſtices conceived it was not a Preſident to be followed, being part of the Ceremony for the Creation of Serjeants, which ought to be performed in ſolemn manner: Nor could it be convenient to ſuffer any more ſuch examples. Therefore they all reſolved, That the Writs of the ſaid Serjeants retornable *immediate* to appear in the Vacation, and then ſwear them at the Lord Keepers Houſe, was not legal and according

cording to the courſe of Law: For although the *Chancery* be always open to purchaſe general Writs, or try matters of Equity, to have Writs retornable *immediate*, yet this Writ, which is of ſo high a nature as to command *ad comparendum & recipiendum Statum, & gradum ſervientis ad legem*, ought to be made retornable at a day certain in Term, and not in the Vacation when a day cannot be prefixed (as of neceſſity ought to be) for the performance of all the Ceremonies requiſite for that Calling: Whereupon they moved the Lord Keeper to have other Writs directed unto them, to take the ſaid Eſtate and Degree, retornable in *Chancery*, *May* the 4th being the firſt of this Term, which was done accordingly, and they ſworn there by agreement amongſt themſelves in this order. Firſt, Sir *John Walter*, who had a Warrant to be the Kings Serjeant, and appointed to be chief Baron (in the place of Sir *Laurence Tanfield*, who died the 30 of *April* before) Then Sir *Henry Yelverton*, who had been the Kings Attorney, and was ancient to them both, and laſtly Sir *Thomas Trevor*, who had alſo a Patent to be the Kings Serjeant: And on Tueſday, *May* 10. in the ſecond week of the Term, the ſaid Sir *John Walter* being of the *Inner Temple*, Sir *Henry Yelverton* of *Grays Inn*, and Sir *Thomas Trevor* of the *Inner Temple*, with the Benchers, Readers, and others of thoſe Inns of Court, whereof they reſpectively had been, being attended by the Warden of the *Fleet* and Marſhal of the *Exchequer*, made their appearance at *Serjeants Inn* in *Fleetſtreet*, before the two chief Juſtices, and all the Juſtices of both Benches. And Sir *Randolph Crew*, chief Juſtice, made a ſhort ſpeech unto them, and (becauſe it was intended they ſhould not continue Serjeants to practiſe) he acquainted them with the Kings purpoſe of advancing them to Seats of Judicature, and exhorted them to demean themſelves well in their ſeveral places. Then every one in his order made his Count (and *defences* were made by the ancient Serjeants) and their ſeveral Writs being read, their Coyfs and Scarlet-hoods were put on them, and being arrayed in

in their brown-blew Gowns, went unto their Chambers, and all the Judges to their ſeveral places at *Weſtminſter*, and afterward the ſaid three Serjeants, attired in their party-coloured Robes, attended with the Marſhal and Warden of the *Fleet*, the ſervants of the ſaid Serjeants going before them, and accompanied with the Benchers and others of the ſeveral Inns of Court, of whoſe ſociety they had been, walked unto *Weſtminſter*, and there placed themſelves in the Hall over againſt the *Common Pleas* Bar.

And, the Hall being full, a lane was made for them to the Bar; then (the Juſtices of the *Common Bench* being only in Court) they recited their ſeveral *Counts* (and ſeveral *defences* made to ſeveral *Counts*, and had their Writs read. The firſt and third by *Brownlowe* the chief Prothonotary, and the ſecond by *Goulſton* the ſecond Prothonotary. And Sir *John Walter* and Sir *Thomas Trevor* gave Rings to the Judges with this Inſcription, *Regi Legi ſervire libertas*. And Sir *Henry Yelverton* gave Rings, whereof the Inſcription was *Stat Lege Corona*, and preſently after (they all ſtanding together) returned to *Serjeants Inn*, where was a great Feaſt, at which Sir *James Lee*, Lord Treaſurer, and the Earl of *Manchester*, Lord Preſident of the Council were preſent.

Pref. 10. Rep. 99
2 Cr. p. 2.

And upon Thurſday the Twelfth day of *May*, Sir *Henry Yelverton* was made Juſtice of the *Common Bench* (being the fifth Juſtice) and the ſame day Sir *John Walter* was ſworn chief Baron, and Sir *Thomas Trevor*, one of the Barons of the *Exchequer*.

Pref. 4. Rep. 30.
Poſt. 125.

Termino

Termino Paſchæ anno primo Caroli Regis in Communi Banco.

Hamond *verſus* Dod.

DEBT, upon an Obligation conditional, reciting whereas ſuch Copy-hold Lands were to be ſurrendred by A. S. at her full age, to the uſe of the ſaid Hamond and Gay, and their heirs, and that Gay ſhould pay to Hamond thirty three pound at ſuch a day, and if he failed, it ſhould be to the uſe of Hamond and his heirs. It was conditioned, That if the ſaid Obligor procured the ſaid A. S. at her full age to ſurrender to the uſe of Hamond and his heirs, and if Hamond and his heirs might have and enjoy the ſaid Lands to him and his heirs, That then, &c. The Defendant pleaded that Gay did not pay the thirty three pound, and that the ſaid A. S. came of full age ſuch a day, and afterwards at ſuch a Court, in full court, did ſurrender, releaſe and quit claim, to the now Plaintiff, being in poſſeſſion, all her right, eſtate and intereſt in the ſaid Tenements, &c. and that the Plaintiff alwaies after might have enjoyed the ſaid Tenements, &c. The Plaintiff replyeth, Quod bene & verum eſt, That the ſaid A. S. did ſurrender &c. prout. But that afterward, (viz. on ſuch a day) the ſaid Gay entred and expelled him, &c. Whereupon the Defendant demurres: And now this Term, it was moved by Athoe Serjeant, That this Replication was good, without ſhewing that the Expulſion was for title; becauſe by the Obligation he hath taken upon himſelf, to defend againſt all titles: Vid. 2. Edw. 4 fol. 15, If a Replication be not good, yet if the barr be ill in ſubſtance, Judgment ſhall be for the Plaintiff: Vid. Coke 3. Rep. fol. 52. Ridgway's caſe. But it was reſolved, That this Replication is not good, becauſe he hath not ſhewn that he was evicted by lawful title. For otherwiſe the

f.

2 *Cr.* 315.

Co. lib 8. 120 *b.*
2 *Cr.* 133.

Moor 861.
Co. 4. *fo.* 80. *b*
Hob. 35. 74

Bond doth not extend unto it: Vid. 15. Eliz. Dyer. fol. 328. & 26. Hen 8. fol. 3. It was alſo held, That the Barr (that ſhe ſurrendred and releaſed in Court,) is good and certain enough, according to common intendment. And although it be not ſaid, that ſhe ſurrendred to the uſe of the Plaintiff; yet being alledged to be ſurrendred and releaſed in Court, and accepted by the Plaintiff, and confeſſed in the Replication, It was a ſurrender to the uſe, &c. and good enough, &c.

Co. 5. f. 121. a. Co. Litt. 303. a. Poſt. 63. 195. Co. 8. 133. b.

Holme *verſus* Lucas.

2. ASſumpſit. The Declaration and Writ were, Quod cum indebitatus fuit to the Plaintiff, in fiftéen pounds. In conſideration whereof, he aſſumed to pay unto the Plaintiff the ſaid fiftéen pounds, &c. The Defendant pleaded, Non aſſumpſit, and found for the Plaintiff; and now moved in arreſt of Judgment, That this Declaration is not good, becauſe it is generally, Indebitatus aſſumpſit; and doth not ſhew for what cauſe, viz. for merchandiſe ſold, or money lent, or for other cauſes which lye in contract: For if it were Indebitatus by judgment, or by ſpecialty, which lyes not in contract, an Aſſumpſit in conſideration thereof would not lye; becauſe damages recovered in an Aſſumpſit, cannot be a barr to a debt upon a record or ſpecialty. Henden Serjeant for the Plaintiff agréed, That ſuch a Declaration had not béen good, if the Defendant had demurred unto it: but having now pleaded Non aſſumpſit, and the Jury having found Quod aſſumpſit. It ſhall be intended, That he aſſumed for ſuch a debt which lyeth in Aſſumpſit. And therefore the Defendant hath made his Declaration good; and as to this point, divers precedents have béen in this Court, That after verdict, it hath béen held good: And the Plaintiff had judgment; and many precedents were alledged to have béen the other way, in the Kings Bench and Exchequer Chamber: Whereupon it was appointed, That precedents on both ſides ſhould be ſearched. And in the mean time, Curia adviſare vult.

Hob. 5. 284. 2 Cr. 207. Co. 10. 77. a. 2. Cr. 548. Hob. 5. Poſt. 415. Reſolv. poſt. 31.

Einl. 148. Arſcott *verſus* Heale, in the Exchequer Chamber.

3. ERror of a Judgment in the Kings-Bench, in debt, upon an Obligation of two hundred pounds, conditioned for the payment of one hundred pounds by John Arſcott, John Chicheſter, and John Vigniers, or any of them. They being all joyntly and ſeverally obligors: The Defendant John Arſcott pleads, That he paid it at the day. The Plaintiff replies, That neither the ſaid John Arſcott, John Chicheſter, nor John Vigniers, nec eorum aliquis had paid the ſaid hundred pounds at the day, Et hoc petit quod Inquiratur &c. & prædictus Johannes Arſcott ſimiliter. The Jury found, That the foreſaid John Arſcott had not paid the ſaid hundred pounds, as the Defendant had pleaded; and thereupon Judgment was given for

for the Plaintiff: And the Error assigned, was, because the Verdict was not according to the issue; for it might be paid by any of the others, which had sufficed. But the Court held it to be well enough: For the Addition of John Chichester and John Veigners, (not mentioned in the barr) was but surplusage: And their finding that John Arscott did not pay the money, is sufficient. And it shall not be intended, that any of the other two had paid it, when the Defendant saith that he himself paid it. And if it had been proved, that any of the other two had made the payment, the Jury should have been directed to find, that the Defendant had paid it by such, &c. Whereupon Judgment was affirmed. Hob. 49. 54. 119 post. 25. 54. 78. 2 Cr. 71.

Saverne *versus* Smith, in the Exchequer Chamber.

4.

ERror of a Judgment in an Ejectione Firmæ, upon a special Verdict, the case was, That John Dix, being a Copyholder in fee of the Manor of Swafling, had issue two daughters, Agnes married to John Smith, and Margaret married to William Reve, and dyed seised: William Reve made a lease for ten years of Margarets part, without licence, and against the custome of the Manor: Which being presented by the Homage, as a forfeiture, the Lord seized upon it, and granted it to the said John Smith and his Heirs. Afterward William Reve dyed, having issue Nicholas, who entred and let to the Plaintiff, for three years. The Plaintiff entred, and was ejected by the Defendant, who claims under the said John Smith. Et si super totam materiam, &c. The Judgment was entred pro eo quod videtur Curiæ, That the Defendant was guilty of the trespass and ejectment aforesaid, modo & forma prædict. as the Plaintiff hath declared. Ideo consideratum est, That he shall recover his damage aforesaid, &c. The Error assigned in Law was, First, That Judgment is given for the Plaintiff, where it ought to have been given for the Defendant. Secondly, Because the Judgment is for the ejectment de integris tenementis, where it ought to have been but of the moity. For the matter in Law, the case is, A Copyholder in fee takes husband, who makes a lease for years, which by the custome of the Manor, is a forfeiture. The husband dyeth: Whether this forfeiture shall bind the *Feme* and her Heirs, after her husbands death? And it was adjudged, it should not bind; but that the *Feme* shall have it again, after her husbands death, notwithstanding the forfeiture. Athoe Serjeant said, That for the first point, he would not insist whether it were error or no. For he conceived the second to be a manifest error; because the Plaintiff had no colour to have an Ejectione firmæ, but for a moity only. And the Judgment was given for the whole, and intire Damages assessed by the Jury. Whereupon Curia advisare vult. Benl. 147. 1. Rol. 509. 1 Rol. 509. 2 Jurl. 309. 2 Cr. 105. Co. 4. 23. a. 27. a. 3 Cr. 149. b.

Flight *verſus* Craſden.

5. Hutt. 76. ASſumpſit, Whereas the Plaintiff was obliged to the Defendant in an Obligation of ſixty pounds, to pay thirty the 9. day of May 1624. That the Defendant, the ſaid 9. of May, in conſideration the Plaintiff would pay unto him the ſaid 30. li. upon the ſaid 9. of May, promiſed to deliver the ſaid Bond to be cancelled, And alledgeth in facto, that he paid the ſaid 39 li. to the Defendant according to his promiſe, and that the Defendant had not delivered him the ſaid Bond to be cancelled, but refuſed, and had cauſed him to be arreſted thereupon, to his damage, &c. The Defendant Proteſtando that he made not any ſuch promiſe, pro placito dicit quod non ſolvit, &c. whereupon they were at iſſue, and being found for the Plaintiff, Gwin Serjeant moved in arreſt of Judgment, That this is not any conſideration to charge the Defendant. For he received but his mony at that inſtant time, and conſideration ought always to be matter of profit and benefit to him to whom it is done, by reaſon of the charge or trouble of him who doth it: Otherwiſe it is not a ſufficient ground for a promiſe, and ſo the Action lies not; And for proof hereof, he cited 9 Edw. 4. fol. 19. But Richardſon Ser-
4 Co. R. 329. a. 3. Cr. 429. 3 Cr. 194. jeant for the Plaintiff ſhewed, That it is conſideration ſufficient to have it paid without ſuit or trouble; for peradventure the non-payment at that time would be more prejudicial unto him, than the forfeiture of the Bond would be of advantage, if he ſhould be forced to ſue for it. And he promiſed to do nothing, but that, which in honeſty and equity he ought to do, (viz. to deliver up the Bond upon payment of the mony) which promiſe is binding. And of that opinion was all the Court, for the reaſons before alledged. And Hobert ſaid, if he had promiſed in this caſe, That if he would pay the mony in the morning of the ſaid day, he would give him five pounds, it had been a good promiſe, becauſe the mony was paid before Sun-ſet, (the time when the law appoints it to be paid:) And it was adjudged for the Plaintiff. Harvey & Yelverton abſentibus.

Sr. Upwell Caroons caſe.

Co. Lit. 2. b. 6. SIr Upwell Caroon, an alien born, and not made Deniſon, (being Agent here for the States of the Low Countreys,) dyed inteſtate. And now conteſtation was made to whom Adminiſtration ſhould be comitted. For the Judge of the Prerogative offered to commit it to three of his brothers and ſiſters children, who were aliens born, and lived in the arch-Dutcheſs countrey. But one who was Grand-child of his ſiſter, born in England and inhabiting here, indeavouring to obtain it, moved, That of right it appertained unto him, being a Deniſon; becauſe the eſtate conſiſted in Leaſes for years, of lands, and perſonal eſtate in debts, and that
Co. Lit. 2. b. Aliens may not have Leaſes for years, although they may have perſonal

perſonal things, and therefore prayed a Prohibition, Sed Curia adviſare vult. Afterwards in Michaelmas Term, being again moved, It was reſolved by the whole Court, That no Prohibition was grantable: For an Alien may be Adminiſtrator, and have Adminiſtration of Leaſes, as well as of perſonal things, becauſe he hath them in anothers right, and not to his own uſe, And he may be Adminiſtrator as well as a perſon Outlawed or Attainted may be an Executor; And this Court hath no authority about committing Adminiſtrations, &c. Paſch. 41. Eliz. rot. 1704. Beck verſus Philipps. Debt brought by an Adminiſtrator, The Defendant pleads that the Plaintiff was an *Alien nee*, adjudged *Quod Reſpondra ouſter.*

Co. Litt. 129. b. 4.

Co. L. 128. a.

3 Cr. 683. 1. Moor. 431.

Doctor Brikendens Caſe.

7.

PRohibition was prayed, becauſe upon proſecution in the Spiritual Court for Tythes, Sentence was againſt the Defendant, and an Appeal ſued thereupon, and Doctor Brikenden made thereby a party as promotor of the ſuit, who was not any party thereto; And herein the firſt Sentence was confirmed, and this was in November 1623, and coſts were then awarded to Doctor Brikenden, but not taxed untill Hillary term 1623. that is to ſay, between the time of awarding the coſts, and of taxing the ſame came the Pardon, which pardons all offences before December 1623. whereby this offence, and the coſts taxed thereupon (as was pretended) although they were awarded in the ſpiritual Court before the ſaid Pardon, were alſo pardoned; and becauſe it was not there allowed, A Prohibition was prayed; but denyed. For thoſe Coſts being awarded to the party before the Pardon, although they be taxed afterwards, be not taken away by that Pardon.

Co. Lib. 5. 51. b. Poſt. 47. 199.

Marſhalls Caſe.

Lat. 43.

8.

EJectione firmæ After imparlance the Defendant pleaded *Auncient Demeſn*, and it was thereupon demurred; For being after Imparlance it came too late: But the Court doubted thereof, becauſe ſuch land is not impleadable at the common-Law, and therefore it came timely enough when he had not pleaded any other Plea. Sed Curia adviſare vult.

Yel. 112.

Co. 5 R 18 105. a.

Termino Trinitatis, anno primo *Caroli* Regis, in Communi Banco

Lionell Farringtons caſe.

1. DEbt was brought upon the Statute of 23 Elizab. Reginæ againſt Thomas Prince and his wife, Ad reſpondendum 120. l. for the Recuſancy of his wife, and abſence from Church for eleven moneths, viz. from the twenty third of September, viceſſimo primo Jacobi, unto the day of the writ: per quod, Actio accrevit eidem Domino Regi, & Lionello Farrington; qui tam, &c. ad habendum the ſaid 120. l. Upon this Declaration the Defendant demurres; pro eo quod Declaratio ipſius Lionelli minus ſufficiens in Lege exiſtit ad ipſum Lionellum, qui tam, &c. verſus ipſum Thomam manutenendum, &c. unde petit Judicium. Et quod prædictus Lionellus, qui tam, &c. ab Actione ſua prædicta verſus eos habendum præcludatur. Et prædictus Lionellus, qui tam, &c. ex quo ipſe ſufficientem materiam in lege, ad Actionem prædictam verſus eos manutenendum ſuperius declaravit, &c. And they joyned in demurrer; which being entred in Hilary Term; King James departed this life in the vacation following; and it was moved in Eaſter Term, whether the original Writ, Declaration, Pleading and Demurrer upon that Action being brought by the Informer for the King and himſelf, ſhould be abated by the demiſe of the King, as an original brought by two, where, by the death of either, the Writ ſhall abate; or as Writs original brought by the King, in his own name only; as it is in Cok. 7. Rep. fol. 30. Or whether the Writ and Declaration only ſhall ſtand and not be diſcontinued, as it is reſolved in the ſaid caſe: Or whether the Writ and Declaration and all proceedings thereupon ſhall ſtand by the Statute of primo Edward. 6. capite ſeptimo, as it ſhall do in Writs of debt, betwixt common perſons: And becauſe no precedent had been produced in ſuch caſes, and many precedents were, that thoſe only ſhould ſtand: But all Demurrers and Pleadings to informations were determined: The Court adviſed until this Term, and ordered, That precedents ſhould be ſearched, to know what had been done in Actions of debt upon penal Statutes, brought by information for the King and party. And now being moved again, and informing, That there could not any precedents be found, and that ſuch Writs upon that Statute had not been frequent, but of late: The Court reſolved, that this Writ and Declaration, with all the proceedings thereupon, ſhould ſtand: For it is meerly the ſuit of the party, and within the Statute of primo Edward. 6. which ſhall not be diſcontinued or abated

Hutt. 82.

2 *Cr.* 14.

2 *Cr.* 14.

Lib. 7. 30. *b.*

Moor 748.

bated. For although the Writ be, Quod reddat Domino Regi, & Informatori; yet it is presumed for himself, he being as the original party only: For the Statute appoints, That no protection or wager of Law shall be therein: And the pleading upon this Writ shews as much; viz. That the Plaintiff Farrington shall maintain his Action; And That the Declaration is not sufficient to compel him to answer to the informer, never mentioning the King. And the Replication and joyning in demurrer is only by the informer; viz. That it is not sufficient to barr him of his Action: Whereupon they all resolved, That not only the Writ and Declaration, but all pleadings thereupon and the demurrer should stand. Ld. Cok. Rep. 7. fol. 30. Dy. 125. 6. Edw. 6. Fitzherbert Nonsuit. 13.

George Venables case

THis Term a Writ of Priviledge was signed by all the Justices of the Common-Bench for George Venables a Clerk under the Custos Brevium, to free him from being a Souldier, reciting, That it is the custome and priviledge of the Court, time whereof, &c. That neither the Attorneys nor Clerks of the Court shall be pressed for Souldiers, nor elected to any other Office sine voluntate sua, but ought to attend the service of the Court, vide the Lord Coke's book of Entries. fol. 436. where the like Writ of priviledge was granted to a Clerk of the Kings-bench, to discharge him from being pressed for a Souldier. 2.

NOte That upon Monday the twentieth of June this Term, being the first day of *Octabis Trinitatis*, A Writ of *Adjournment* was delivered to the Justices to adjourn the two Returns of *octabis Trinitatis*, & *Quindena Trinitatis*, *usque tres septimanas post Trinitat.* Which was *die Lunæ* the last week; And that all pleas and process, & all Returns of Sheriffs should be adjourned to that Return. And the Writ was dated the *eighteenth day of June*, which was *die Sabbati* in the first Return; Which mentions, That whereas the Pestilence much increased in *London*, the Suburbs & parts of *Westminster*; And if the Subjects of all parts of the Realm should resort hither for law causes, it would be very dangerous to increase the Sickness, to the peril of the Kings Person, and of forraign States resorting unto him. Therefore the King, by advice of his Council & Judges, &c. had appointed, &c. And thereupon Proclamations issued, bearing date the *eighteenth day of June*, *anno primo Caroli Regis*; signifying the Kings pleasure to adjourn these two Returns untill the last Return; And that the last Return should be held only for continuance of Causes and Process, and for the Joyning of Issues; but that no proceedings should be upon demurrers, or special verdicts; nor any Judicial hearings in any of the Courts of *Chancery*, *Starr-Chamber*, *Court of Wards*, *Court of Requests*, 3. 2 Cr. 16.

Requeſts, *Dutchy*, or *Exchequer* Chambers: And that no perſons ſhould be compelled to appear in perſon, but by Attorny, with a proviſo, That all Accountants and parties appointed to pay Money into the Exchequer, ſhould hold their dayes in the Exchequer to account. And thereupon the Juſtices of the Kings-Bench, Common pleas, and Barons of the Exchequer, ſate in their ſeveral Courts, & heard divers motions in their reſpective Courts (but none upon any demurrers or ſpecial verdicts) and ſo continued untill eleven of the Clock that morning: And then in the Common-Bench, the Writ of Adjournmet (enſealed and incloſed in wax, with the great patent Seal) was opend; and three Proclamations made to hear the Writ of Adjournment read, which being done, the Cryer rehearſed the effect of the Writ of Adjournment in Engliſh; that all Pleas, Proceſs and Appearances thereunto, were adjourned until *Tres Trinitatis:* And then the Court roſe without doing ought elſe: Nor were there any Eſſoyns or proceedings made upon that Return. And upon Monday in *Tres ſeptimanas Trinitatis* (being the day of Eſſoyns of the ſaid return) the day following, and the laſt day of the Term, the Court ſate again, and heard all motions; but none upon Demurrers, or ſpecial Verdicts, by reaſon of the Proclamation aforeſaid. And all Recoveries, Fines and motions for proceeding to Tryals, were as if it had been in full Term. *Vide Trin.* 4. *Edw.* 4. *fol.* 20. *Trin.* 11. *Edw.* 4 *fol.* 37. *Trin.* 21. *Ed.* 4 *fol.* 37. *Mich.* 5. & 6. *Elizab. Dyer* 225.

1.Cr.231.
2Cr.446.Com.
Cr.2.

Termino

Termino Michaelis, anno primo *Caroli* Regis, in Communi Banco, apud Reading.

THe King by Proclamation three weeks before the beginning of Michaelmas Term (in reſpect the Sickneſs continued ſo great at *London*, and at the parts thereto adjoyning) ſignified his pleaſure, That the ſaid Term ſhould be adjourned from *octabis Michaelis*, untill *menſe Michaelis*: And, on the firſt day of *octabis Michaelis*, Juſtice *Yelverton* (puiſny Judge) had a Writ to adjourn accordingly; it being his turn to keep the Eſſoyns. And like Writs of Adjournment were directed to the Juſtices of the King-bench, and Barons of the Exchequer: And the puiſny Judge, and Baron of every Court came to *Weſtminſter*, the firſt day of the Return (being the day of Eſſoyns) and read the Writ of Adjournment of their Courts only; and did nothing elſe. And at *menſe Michaelis*, the Juſtices of every Court had other Writs directed unto them, to adjourn, untill *Craſtino animarum*, to *Reading*. And the King, by Proclamation bearing date the eleventh day of October, ſignified his pleaſure, That his Courts of *Chancery*, *Requeſts*, *Wards*, *Starr-Chamber*, *Dutchy*, *and Receipt of the Exchequer*, ſhould be there held. And accordingly the firſt day of *menſe Michaelis* (which was the day of Eſſoyns) the puiſny Judges of all the Courts of the Kings-Bench, Common-pleas and Exchequer, came to *Weſtminſter* and read the ſaid Writs; and adjourned the Term unto *Reading*. 1. 2 Cr. 17. 2 Cr. 17. V. poſt. 27.

IN the mean time, *viz.* upon the twenty ſeventh day of October, *John Williams* (Biſhop of *Lincoln*) Keeper of the great Seal, was diſcharged of his place. And upon the thirtieth of October, being Sunday, Sir *Thomas Coventry* of the *Inner-Temple*, Knight, the Kings Attorney, was made Keeper of the great Seal. And the ſame day Sir *Robert Heath*, the Kings Solicitor, was made Attorney-General: And *Richard Sheldon* made Solicitor, and Knighted; both being of the *Inner-Temple*. 2.

UPon *Craſtino animarum*, being Thurſday, & the day appointed by the Statute of 9 *Edw.* 2. for the Chancellor, Treaſurer & Judges meeting in the Exchequer, to nominate perſons to be made Sheriffs for all Counties, It was much doubted whether all the Juſtices were to come thither, it being the day of Eſſoyns, and to ſit in Court; or whether they might ſtay untill *quarto die poſt*; And that one of them only ſhould come the firſt day to keep the Eſſoyns. And by reaſon of the ſhortneſs of the time from the change of the Lord Keeper, it was appointed by the King, That the day of the billing of Sheriffs ſhould be deferred from the uſual day; and that all the Juſtices, 3. Poſt. 595. acc.

Justices, besides the three puisny Justices (who were to keep the Essoynes) should not come untill Saturday; And that no Court should sit untill Monday; For they held That the *quarto die post* of the Return is properly the day for sitting, and not before, although it be after Adjournment: as it were the Term beings without Adjournment.

Post. 102. 200. Dier. 225 b.

4.

UPon the Tuesday following, all the Justices were assembled at the Lord Keepers house, to be conferred withall, whether it stood with Law, or was convenient to grant an *Habeas corpus* to the Warden of the Fleet, or to the Marshal, by their Keepers or others, to have any Prisoner which was in execution, to appear at a day certain the next Term in Court; & under colour thereof, That the said Prisoner should go at large with his Keeper, in the Vacation or Term time, and return to Prison at the time appointed. And all the Justices and Barons agreed, That it was not allowable or justifiable in Law: But the Warden and Marshal have only a convenient time to bring the Prisoner accordingly in Court, and to carry him back again to Prison: And if they suffer him to go at large any longer time than is convenient, (And the Law shall adjudge what is convenient) it is an escape in him. And the Lord Keeper and all the Judges agreed, That they would not grant any *Habeas corpus* returnable for a longer day, than the necessity of the case required; and not otherwise than stands with Law, as in Debt, Trespass, and other Actions, where Bail is to be put in, to answer to suits. And they admonished the Warden of the Fleet, That under colour of such Writs, he should not suffer Prisoners to go at large, upon peril to be charged with escapes.

3 Cr. 5. Co. 3. 44. a 1 Rol. 898. Hob. 202. Post. 466.

Sir John Isham *versus* York.

5.

ACtion upon the Case for words, Whereas the Plaintiff is and hath been Justice of the Peace of the County of North-hampton for ten years, That the Defendant, to scandalize him in his place, and to cause him to be amoved out of Commission, spake these words, I have been often with Sir *John Isham* for Justice, but could never get any at his hand, but injustice. After verdict, upon not Guilty pleaded, and found for the Plaintiff, it was moved in arest of Judgement, That these words be not actionable; for it is not said that he offered him injustice in his office of Justice. Nor that he complained unto him for Justice, as Justice of the Peace, and he denyed it: But generally, That he could not have Justice: And it might be, that he complained unto him for matters betwixt party and party, for private offences, wherein he could not have redress, as from a Justice of Peace. Afterwards at another day Serjeant Crew, of Council with the Plaintiff shewed, That the Plaintiff declaring that he was a Justice of Peace, and that the Defendant intending to scandalize him in his place, and cause him

1 Rol. 57.

Moor. 148.

3. Cr. 358

him to be removed, had ſpoken, &c. And being found guilty thereof, it muſt be intended thoſe words were ſpoken upon that occaſion, & of him as a Juſtice of Peace, and not of him as a private perſon, or for any private occaſion; and compared it to the caſe of Beechley and Steukley, Coke. 4. Rep. fol. 16. a. And of the ſame opinion was all the Court, and thereupon Judgment was given for the Plaintiff. R. 275. 1. Rol. 57

Smith *verſus* Craſhaw, Ward, and Ford, in the Kings Bench.

THe Plaintiff brought an Action upon the Caſe againſt the now Defendants, For that they had falſly accuſed him of Treaſon, at D. in the County of Northfolke, and had cauſed him at the ſaid Town to be apprehended by the Conſtable, and brought before a Juſtice of Peace, who committed him to Norwich-Caſtle, and that at the Aſſizes there, they falſly and maliciouſly had exhibited a Bill of Indictment of Treaſon, before the Juſtices of Aſſize, and falſly and maliciouſly affirmed it to be true; By reaſon whereof he was detained in Norwich-priſon, untill diſcharged by Proclamation. Upon Not Guilty pleaded and Verdict for the Plaintiff, in Michaelmas Term Anno 20. Jacobi Regis, it was moved in the Kings-Bench in arreſt of Judgement upon exceptions then ſhewn, and Judgment thereupon, Quod Querens nihil capiat &c. And it was now there revived again by a new Action upon the Caſe, in nature of a Conſpiracy, as formerly. And the Defendants pleaded ſpecial matter of excuſe, and Travers the malicious accuſation, which was found againſt them, and two hundred forty pounds dammages given. And it was moved in arreſt of Judgement, That this Action lies not, becauſe there never was any precedent ſeen that any ſuch Action or Writ of Conſpiracy for ſuch cauſe, was brought, nor is it ever mentioned in any of our books, (for the miſchief which might enſue to the State, if men ſhould be deterred from diſcovering Treaſons.) But all the Juſtices, after divers motions in ſeveral Terms, & long conſideration of this Caſe (being the firſt precedent which can be ſhewn) reſolved, That the Action well lies, for it being alleadged to be falſly and maliciouſly, and by Conſpiracy exhibited, and the Defendants by the Verdict found to have falſly and maliciouſly exhibited it, It is not reaſon it ſhould be diſpunishable; for then no perſon would be ſafe, if ſuch practices ſhould be ſuffered, and the parties endangered thereby ſhould have no remedy, and therefore they adjudged it for the Plaintiff: Note, the Statute and the writ of Conſpiracy do not in particular mention for what cauſe, but generally declare If any falſly and maliciouſly conſpire to procure any to be Indicted. And here in this Caſe, it being ſet forth, That they falſly and malciouſly accuſed him of Treaſon, where they knew it to be falſe, and falſly and maliciouſly had conſpired to cauſe him to be Indicted, and falſly and maliciouſly exhibited an Indictment, and had ſworn the matter thereof to be true, whereas

6. Lat. 79. 1. Rol. 112. 3. Jones 93. Benl. 152 2 Bul. 271. Co. 9. 55. b. Benl. 13. 8. 1 Rol. 112. 3. 2 Cr. 358. V. Co. 9. 55. 56 2 Cr. 358. con. V. 33. E. 1.

whereas it was false, and they knew it to be false, And it is traversed, That they did not falsly and maliciously accuse him, and exhibit the Indictment, which also is found against the Defendants (so the substance of the Declaration is found against them.) It is good cause of Action, and the Defendants are not to be excused of such falsities, nor the Law will not suffer the Defendants to go unpunished; wherefore, by the opinion of all the Justices in the Kings Bench (who delivered their opinions seriatim, viz. Sir Randolph Crew Chief-Justice, Dodderidg, Jones, and Whitlock) It was adjudged for the Plaintiff.

Greens Case.

7. GReen prayed a prohibition to the Ecclesiastical Court at Salisbury, because his Wife sued him there to be separated from him, propter sævitiam. And sentence was there given for the Husband against the Wife; and he enforced to pay all the costs for his Wife: Afterward she appealed; and because the Husband would not answer the Appeal against himself, and pay for the transmitting of the Record, he was therefore excommunicated; and now prayed a prohibition. The Court conceived the case to be very hard, that he should be enforced to spend his Money against himself. But because it was alledged, That the course was so in the Spiritual Court, they would advise untill the next Term; and ordered to stay their proceedings in the mean time.

Cook *versus* Younger.

8. *Vide cr. 636. V. post. 47.* ACtion upon the Case. Whereas the office of the under-Stewardship of the Courts of the Manor of Keysham, and other the Manors of the Bishop of Glocester, was anciently an office grantable for term of life, with the fee of three pound six shillings and eight pence, by the year; And whereas a former Bishop of Glocester had granted to the Plaintiff the said Office for Life, *Post. 47.* with the fee of three pounds six shillings eight pence, payable annually at the two feasts of the year, viz. at the Annunciation of the virgin Mary, and at Saint Michael the Arch-Angel, issuing out of the said Manors. And that the said Bishop oyed, And that the Plaintiff was ready to keep the Courts of the now Bishop; But the Defendant pretending a grant made unto him from the said Bishops successors, disturbed him from keeping of them. After Not Guilty pleaded and found for the Plaintiff, It was moved in arrest of Judgement, That this Grant was void, to bind the successor of the Bishop. First, because the prescription is, That the said Office is grantable with a fee of three pound six shillings eight pence by the year, and here the payment is appointed to be at two feasts of the year, and so not warranted by the Statute. Secondly, because the prescription is, That the Office is grantable for

for Life, and he doth not shew for whose life; and it may be for the life of the Bishop, who was Grantor: But none of these exceptions were allowed. And to confirm their opinions, the Case of the Dean and Chapter of Worcester in Cok. 6 Rep. fol. 37. 38. a. was vouched, That the days of payment are not material where no less than the ancient rent is reserved yearly; and that the prescription being to grant for life, shall be intended to be for the life of the Grantee. Thirdly, it was objected, That here was a Mis-triall, the disturbance being alledged to be in the Court at Keysham, & so in other Manors where no Wills are, and the Tryal being per vicinetum of the Manors, whereas it ought to be of the Wills wherein the Manors are; it therefore was not good, nor ayded by the Statute of 21 Jacob. But the Court held, That in regard some of the said Manors are alleadged to be within those Wills, and the venue being of the Manors, It shall be good by the Statute, although it were of fewer or more places then it ought to be. And therefore Judgment was given for the Plaintiff.

Post. 283.

1 Iac. cap. 23. p. 312. 162. 480. Co. Litt. 125. b. Co. lib. 6. f. 14. b

} Bryan *versus* Wetherhead, Trin. 20: Jac. Rot. 602.

9.

Ejectione firmæ. Upon Not Guilty pleaded, a special Verdict was found, That John Bryan being seized in Fee of a Tenement, called Keysham, in Alesbury, (being Copy-hold of the Mano of Alesbury, whereof Sir John Packington was Lord) erected a building by Incroachment upon six foot of the waste of the said Manor, and adjoyned it to the Shop of the said house. Afterwards Sir John Packington, in anno 33. Reginæ *Elizabethæ*, by Indenture demised to the said John Bryan, the said six foot of waste, so built upon, and adjoyning to the said Kysham, for an hundred years; who, in anno primo *Jacobi* Regis, surrendred the said Tenement called Keysham, to the use of Mary Bryan and her Heirs. And, in anno quinto Regis *Jacobi*, assigned all his term in the said six foot of waste so built upon, to the said Mary Bryan, who, in anno 19. *Jacobi*, by Indenture let and demised to William Wetherhead the said Tenement called Keysham, cum pertinentiis, habendum for 70. years, Who assigned all his estate to the Defendant. And afterward, in the said 19. year of King James, the said Mary dyed intestate. And Administration was committed to the said Bryan; who entered upon the said six foot of waste so built upon. And whether by these words, the Messuage called Keysham, cum appertinentiis, this parcell of the shop, built as aforesaid and annexed to the other shop, should pass or no, was the question; And it was resolved by all the Court, That it passed not: For being but a new *purpresture*, and added to the shop of the tenement in Anno 33 Elizabethæ, and not being found that it had been used altogether with the house, or reputed or accepted as parcel thereof, ex vi termini, nothing passed but what was parcel of the house from the time, &c. And the verdict hath found, That it was not accounted as parcel of the house

Post. 57. & 3 Cr. 16. 2 Cr. 526. 169.

from any time after the purchaſe, and therefore it ſhall not paſs by the words cum pertinentiis, eſpecially in a Deed; But in a Deviſe Hobart conceived peradventure it might paſs. And judgement was given for the Plaintiff,

10. UPon the thirteenth day of November, this Term, Sir *Robert Heath* Attorney General came into Court, and brought with him a Commiſſion under the great Seal directed to *the Lord Keper, Lord Treaſurer, Chancellor of the Exchequer, the Juſtice of both Benches and Barons of the Exchequer; the Kings and Solicitor*, commanding them & all Juſtices of Peace in their limits, That they ſhould put in execution all the Laws againſt Recuſants, according to the Petition of the Commons in the laſt Parliament, and the Kings gracious pleaſure thereto ſignified; and further declared his pleaſure, That all ſumms of money collected upon *Eſtreats*, ſhould be imployed to the maintenance of his Ordnance, his Forts and places of defence: and if any ſhould remain, it ſhould be imployed for the ſuppport of his Navy, & ſhould not be put into his publick Treaſury, but by it ſelf, and for thoſe purpoſes; and that all Leaſes of Recuſants lands, or to their uſes, ſhould preſently be called in, as far as by the Law they may be; and that none ſhall make ſuit to have them for recompence of any ſervice or other uſes, but ſhould be only imployed to the uſes aforeſaid.

Sir Francis Vincent *verſus* Leſney.

11. TRespaſs. For that the Defendant Accipitrem ipſius Franciſci percuſſit with his ſtaff, upon which ſtroak the Hawk dyed. The Defendant pleaded Not Guilty, and it was found for the Plaintiff, and damages aſſeſſed to ſix pounds; and now moved in arreſt of Judgement, That the Declaration was not good, becauſe he doth not ſhew what kind of Hawk ſhe was, as Goshawk, Lawner, &c. For Accipiter is the genus, and in the Declaration he 1 Vent. 2 ought to ſhew the Specis thereof: And it is here too incertain, and compared it to Platers Caſe, Coke 5. Rep. fol. 34. quare clauſum fregit & piſces cæpit, &c. where the Declaration was ill, becauſe he ſhewed not their number and kind, as Carps, Tenches, &c. ſed non allocatur; For here declaring Quod Accipitrem ipſius Franciſci, &c. being but one, is ſufficient, and not like to Platers Caſe; which was altogether incertain: And this Caſe is the ſtronger, becauſe it is after verdict, which hath found him guilty of killing of the Plain- Lib. 5. 35. 2. 120. 121. tiffs Hawk. Secondly, it was alledged, That the Declaration was not good, becauſe it is ſaid Accipitrem ipſius Franciſci, and he doth not ſhew that ſhe was reclaimed, for an Hawk is feræ naturæ, and if not reclaimed, the Plaintiff cannot have any property in her, Dy. 306. nor can ſhe be ſaid to be ipſius Franciſci: And to confirm this Spencers caſe in 14. Elizab. in the Lord Dyers Reports was cited: But the Court held the Declaration to be good enough, being in an Action of

of Treſpaſs for ſtriking and killing, &c. which he only may have who hath the poſſeſſion, And it differs from the ſaid Fines and Spencers Caſe; for there it was an Action of *Trover* and *Converſion*; which lyes not but of an Hawk reclaimed, and which may be known by her Vervells, Bells, or by ſome other mark, whereby notice can be taken of her owner. Whereupon it was adjudged for the Plaintiff. 3 Cr. 288. 2 Cr. 262. Poſt 89. 544

Andrew Farrer *verſus* Edward Engliſh.

ASſumpſit. The Plaintiff declares, Whereas in conſideration he was content, and would accept the ſumm of twelve Pounds and ten ſhillings of the Defendant, in diſcharge of all Reckonings and Accompt betwixt the Plaintiff, and one Thomas Engliſh, the Defendants Brother; (who was then out of the County of Northfolk;) and would Seal and deliver a general Acquittance to the uſe of the ſaid Thomas, as he ſhould be required. That the Defendant aſſumed and promiſed to the Plaintiff, he would procure the ſaid Thomas Engliſh, when he returned into Northfolk, to Seal and deliver a general Acquittance to the Plaintiff. And he alledges in facto, that he accepted the ſaid 12. li. 10. s. in ſatisfaction of all reckonings; And that primo Maii, anno 12. Jacob. at Norwich, he Sealed and delivered a general acquittance to Edward Smith, to the uſe of the ſaid Thomas Engliſh; And that upon the ſaid firſt day of May anno 21. Jacobi, the ſaid Thomas Engliſh returned into Northfolk; And that the Defendant, licet requiſitus by the Plaintiff, the ſaid firſt day of May, hath not procured the aforeſaid Thomas Engliſh to make a general acquittance, Sed hoc facere penitus recuſavit. The Defendant pleaded Non Aſſumpſit, and found for the Plaintiff. And now Athoe Serjeant moved in arreſt of Judgement. Firſt, becauſe there is not any ſufficient conſideration why Edward Engliſh ſhould pay, or the other ſhould accept the ſaid twelve pound ten ſhillings in ſatisfaction, and ſhould make that promiſe. Sed non allocatur, for he paying, and the other accepting, is ſufficient. Secondly, beauſe the conſideration is not ſufficiently alledged to be performed on the part of the Plaintiff, being executorie. For he alledgeth that he delivered a general Acquittance; but ſhews not any, whereby it may appear to the Court to be a ſufficient Acquittance. Thirdly, becauſe it was alledged to be delivered to Edward Smith, to the uſe of the ſaid Thoms Engliſh, who is a ſtranger, and peradventure could not, or would not deliver it to Thomas Engliſh; and it was the intent of the parties to have it delivered to the party himſelf, or to Edward Engliſh, who was party to the promiſe. And for theſe two laſt reaſons I held, That the Declaration was not good: But the Lord Hobert, Harvie and Yelverton conceived the Declaration to be well enough: For, the promiſe being general, To Seal and Deliver a general Acquit- 12. 3 Cr. 143. Poſt. 77. 2. Cr. 570.

tance to the uſe of the ſaid Thomas Engliſh is ſufficient without alledging, That he delivered a general Acquittance, according to the words of the promiſe; and the words being, That he ſhall deliver to the uſe, &c. And he alledging, That he delivered to Edward Smith,
2 Cr. 570. to the uſe, &c. is alſo good enough; eſpecially after Verdict upon Non Aſſumpſit, wherein he denyed the promiſe, but not the performance of the conſideration. But the Lord Hobert ſaid, If he had demurred upon the Declaration, becauſe he did not ſhew the ſaid Acquittance, it might peradventure have been otherwiſe. And it was adjudged for the Plaintiff.

Whyte *verſus* Ryſden

13. ACtion upon the Caſe. Whereas the Plaintiff, at London, ſuch a day and year, accommodaſſet to the Defendant a Gelding, ad equitandum ab London uſque Civitatem Exoniæ, & ibidem ſalvo redeliberandum to the Plaintiff; That the Defendant, intending to deceive the Plaintiff, rid upon the ſaid Gelding from London unto Exon, and from Exon unto London; and, by that riding, ſo much abuſed the ſaid Horſe, that he became of little value; And notwithſtanding the Plaintiff, at Exon, ſuch a day and year, required of him the redelivery of his ſaid Gelding, he then refuſed, & yet refuſeth to deliver him; And the ſame day, at Exon aforeſaid, converted the ſaid Gelding to his own proper uſe, to his damage of twenty pounds. The Defendant pleaded Not Guilty, & found againſt him, and damages ten pounds. And it was now moved in arreſt of Judgement, by Richardſon Serjeant, That this Declaration was not good, to joyn together in one Action, the non-delivery of the Horſe, according to the contract at Exon, and the converſion to his own uſe, and the miſuſing him in the Journey, which are all ſeveral cauſes of Actions. Alſo it appeareth that here was not a
R 364. good trial, becauſe the bargain was at London, and the *Tort* was alledged in riding back to London, and the *miſuſer* in the journey, and the trial ought to have been at London, where the beginning
2 Cr. 150. of the contract was, and not at Exon, where the converſion was alledged. Alſo intire damages being given for all theſe *Torts*, (whereas the ſole cauſe of the Action was, for that the Gelding was not redelivered to him,) it is not good. But all the Court delivered their opinions ſeriatim, That the tryal was good, & the damages well aſſeſſed: Firſt, becauſe the principal *Tort* was, the not delivering upon requeſt, at Exon, according to the contract. And then, when he denyed the redelivery, and after converted him to his own uſe, the Plaintiff may well have an Action for both, and together. And although peradventure the Defendant might have demurred (as the Lord Hobert conceived) for the doubleneſs of the Declaration; yet when he demurred not to it, but pleaded Not Guilty of the premiſes, and is found guilty, that makes the Declaration good; and there is not any cauſe to ſtay the Plaintiffs Judgement. Secondly

condly, The tryal is good de vicineto de Exon, because the *Tort* is supposed to be done there, and not at London. And Thirdly the intire damages are well assessed for the *Torts* alledged in the Declaration: Whereupon it was adjudged for the Plaintiff. Vide Coke 7. Rep. fol. 1. Bulmers Case. Co. 7. 1. b. Hob. 188. 2 Cr. 15.

Castle *versus* Hobbs. Trin. 21. Jacobi, Rot. 2827.

14. EJectione firmæ for lands in Donnington, upon Not Guilty pleaded, a special Verdict was found, That William Read being Copy-holder for life of certain Lands, parcell of the Manor of Donnington, paying 15. s. per annum, to the Lord of the Manor; and that King Henry the eighth being seized in fee of this Manor, anno tricessimo quinto Regni sui, for the summ of 854. li. granted by his letters patents to Richard Andrews and Peter Temple, to them and their Heirs, inter alia omnia Messuagia, Terras, Tenementa, redditus, reversiones, servitia, & Hereditamenta sua, in Donington subscripta (viz.) totum illum annualem redditum quindecem solidorum & alia servitia exeuntia de terris, Willielmi Read; (& sic diversos alios redditus de Copyholders.) Ac totum illud Messuagium & sex virgatas terræ, in Donington, in tenura. J. D. habendum & tenendum omnia prædicta Messuagia, Terras, Tenementa, redditus, reversiones, servitia & hereditamenta, in Donington prædict. to the said Richard Andrews and Peter Temple and their Heirs; And whether the said Patent was a good Patent to convey the said Lands in the tenure of William Read, as aforesaid, they prayed the discretion of the Court. And if it was a good Patent, they found for the Defendant; and if not, they found for the Plaintiff. And thereupon, It was argued by Bridgeman for the Plaintiff, and by Crew for the Defendant. And Bridgeman shewed, That it cannot be a good Patent to convey those Lands to Andrews and Temple, because nothing is granted but the Rent of 15. s. and the Services of William Read, whereby is intended only the Rents and Services, which are due from him, as a Freeholder, and there is not any mention of Lands to be granted, or that it is Copyhold, and it shall not be said to be a passing of the Freehold of the Copyholder. And therefore the King being decieved in his Grant, nothing passed from him, and so the Grant void. But Serjeant Thomas Crew shewed, That this Patent was to pass the Rent of the Copyholder, and Freehold of the Copyholder in Fee, otherwise the Patent should be construed void, wherein these words of the Kings Grant are particularized, (viz.) Totum illud Messuagium, & sex virgatas terræ, Habendum Messuagium, Terras, &c. Which implyes there is no misprision in the Patent: For thereby a Messuage is granted, which cannot be, unless the Copyhold should pass; Wherefore he conceived, It shall pass by construction. And he moved, That if the Patent were void, yet the Plaintiff could not have judgment. For it is found, That King Henry the eighth was seized

seized in Fee, and made that Patent; which if void, then the lands are again in the Crown; and no title being found for the Plaintiff, he cannot have any judgment: But all the Court conceived, It was a void Patent, to convey the land of the Copyholder to Andrews and Temple. For first there is not any land granted, but the rents
Co. 2. 16. b. & services of William Read, which is intended freehold: And there being none such, the grant is meerly void. And for the second point, They all conceived, For as much as the Jury hath found, That if it were a good Patent, Then for the Defendant; if otherwise, they found for the Plaintiff. It is intended, That there is a sufficient title found for the Plaintiff, unless by this Patent it be defeated and avoided. So that if the Jury be satisfied, that the Plaintiff hath any good right by any other manner of title, The Court ought
2 Cr. 94. not to doubt thereof. As it is resolved in Goodales Case in the Lord
Post. 130. 392. 458. Coke 5, Rep. fol. 97. And it was adjudged for the Plaintiff.

Smith *versus* Trinder, & alios.

15. EJectione Firmæ, of a lease by Elizab. Countess of Berkshire, of lands in Water Eaton, upon evidence to the Jury at the Barr, upon Not Guilty pleaded, the case was, That Francis Earl of Berkshire purchased the land in question, to him and his wife, and their heirs, in anno 41. Elizab. Reginæ. Afterward, in anno decimo sexto Jacobi Regis, Francis Earl of Berkshire (without his wife) lets this land to Sir Lawrence Tanfield, late Chief Baron of the Exchequer, for three score years, if they lived so long, rendring two hundred & eighty pounds yearly rent, at the two usual feasts, during the term: Francis dies. Whether this lease shall bind the Countess by the Statute of 32. Hen. 8. cap. 28. was the question, because she was not made a party to the Indenture. And Yelverton, Harvey & my self, upon the first motion and perusal of the Statute conceived, It should bind the Countess. For the body of the Act is, That all Leases made of Land, which the Husband is seised of, in right of his Wife, of inheritance, or joyntly with his Wife by purchase, during the Coverture, or before, shall be good & effectual: And that the Wife shall have such remedy for the rent, as he that made the lease. But then the proviso is, That such lease shall be made of such Land, whereof the Inheritance is in the Wife by Indenture, in his and his Wives name, & that she shall seal, & that the Reservation shall be to him & his Wife, & to the Heirs of the Wife. And that clause shall extend to Lands of Intail of the Wives, joyntly by purchase during the Coverture: For clearly by the body of the Act, It is a good Lease, and not within the Proviso: Because it is not the sole Inheritance of
Co. lib. 8. 72. a. the Wives; And the Proviso extends only thereto; And it is out of the words and intent of the Proviso: For the appointment thereby is, That the reservation shall be to them, & the Heirs of the Wife, which is not intended of a joynt estate; But the reservation should be to both their Heirs. So out of the intent & words of the Proviso.

But

But the Lord Hobert doubted thereof, wherefore it was directed to have it found specially; Then upon the evidence it appeared, that anciently it was in Lease, and occupied by two Tenants; the one paid sixty pounds, and the other an hundred and eighty pounds, and so for both two hundred and forty pounds yearly rent only; and now they are joyned in one Lease, and two hundred and eighty pounds yearly reserved, which is more by forty pounds a year than both the Leases were before. And whether this be a good Lease within the Statute, &c. whereupon a special verdict was found at the barr for both points, and afterwards, it was ended by arbitriment.

Hodgkinsonne *versus* Whood, Trin. 19. Jacob. Rot. 596.
que commence Trin. 19. Jac. 2. Cr. 690.

Ejectione firmæ of a Lease of William Rogers for lands in W. in the County of Salop, upon Not Guilty pleaded, a special verdict was found, That Thomas Rogers was seised of that land in Fee, holden in Socage, and had issue by several *venters*, Francis his eldest Son, and William his second Son, and devised the land in Question to Francis his Son, for life, and after, to the use of the Heirs Males of his body, and for default of such issue, to the Heirs Males of Willam Rogers, and the Heirs Males of their bodies for ever: And for default of such issue to the use of his own right Heirs. And afterwards maketh a Lease for thirty years to William his Son, to begin after his death, and dyeth without other alteration of his Will: William enters, and surrenders his Lease of thirty years to Francis, who enters and lets that Land to the Defendant for years yet enduring; and afterward Francis dyeth without issue, William enters as Heir-male of the body, and makes this Lease to the Plaintiff: And hereupon two questions were made, First, whether this Lease made to William for thirty years, begin after the death of the Devisor, (so being to begin at the same time, that the devise of the Inheritance should take effect) be a countermand and revocation of that devise totally, or only Quo ad the term, and shall stand as to the Inheritance. And as to that point all the Justices resolved, It is not any revocation of the Inheritance, but only for the term, for they both may stand together; and there shall not be any revocation unless it be expressed, That the intent of the Testator is changed, or that they cannot stand together. And here it may well stand with the Inheritance; and for that point, was cited the Case betwixt Coke and Bullock in anno secundo Jacobi, in the Common Bench, where one devised land to his Sister in Fee, and afterwards made a Lease for sixty years unto her of the same lands, to begin after his decease, and delivers it to a Stranger, to the use of his Sister, which Stranger did not deliver it unto her in the life of the Testator, but afterwards, and she refused, and claimed the Inheritance; It was resolved because the Devise and the Lease made

16. 2 Cr. 690.

2 Cr. 690. 691.

2. Cr. 49.

to

to one and the same person, beginning at the same time, cannot stand together in one and the same person, That it was a countermand of the Devise: But there they all agreed (besides Warberton Justice) That if the Lease had been made to any other than the Devisee, they might stand together, and the Lease should
2 Cr. 49. not have been a revocation of the Will, as to the Inheritance, but only during the Term. Another Case was cited in in Mich. ann. 41.
3 Cr. 721. & 42. Elizab. Regin. in this Court betwixt Coward and Marshall, where one devised lands by his Will in writing to one of his younger Sons in fee, and after by another clause in the same Will, devised the same lands to his Wife for life, rendring annually to his said younger Son twenty shillings. It was resol-
3 Cr. 721. ved that both these devises may stand, and that one is not a revo-
1 Rol. 615. cation of the other. But Yelverton cited a Case, adjudged in the Kings Bench, where one deviseth to one in fee, and afterwards make a feoffment to the use of his Wife for life, remainder to his right Heirs; so as it is Quasi the ancient reversion. Yet because he departed with all the estate, it shall be a revocation of the Devise in all, and shall not be good without a new publication; wherefore they all resolved, That in this Case there is not any revocation of the Inheritance; and appointed there should be no more arguments at the Barr as to that point. The second Question was, whether this Devise to Francis and to the Heirs-males of his body, and for default of such issue to the Heirs Males of the Devisor, and the Heirs of their bodies, and for default of such issue to the right Heirs of the Devisor, be a limitation in taile,
Co. Lit. 14. 26. b. Co. 1. 104. a. 3 Cr. 97. 1. Rol. 841 Co. Lit. 22. b. Post. 364. Co. Lit. 22. Hob. 30. to the Heirs Males of the body of the Devisor, so that William may claim by this limitation an estate in tail as by purchase; or whether it vested in Francis only, as being Heir Male to the Devisor, and not by purchase; or if the Inheritance in Fee-simple vested in him, for then his Lease for years is executed out of the Fee estate, and William not claiming as right Heir, is then bound by that Lease made by Francis. And of this point was more doubt conceived, wherefore they ordered it should be argued the next Term; and afterwards, in Hillary Term it was moved again, and adjudged for the Plaintiff.

William Platt Assignee of Richard Platt *versus* Plommer, Mich. 20. Jac. Rot. 1759.

17. COvenant upon Demurrer, the Case was, That a Copyhoder in fee, with the Lords Licence, made a Lease for twenty one years by Indenture, rendring rent, wherein the Lessee covenants for himself his Executors, and Assignes, with sufficient Sureties, That he will erect a pale about such a Close, and lay upon the lands demised yearly forty loads of dung, and sufficiently repair the houses. Afterwards the Lessor surrendred to the use of the Plaintiff and his Heirs, who was admitted accordingly; and for not performing

ming these Covenants, the Plaintiff, as Assignee, brings his action of Covenant; and whether the Assignee may maintain this Action by the Common Law, or by the Statute of 32 Hen. 8. Cap. 34. was the Question; And upon this Declaration the Defendant demurred: The principal doubt was whether a Copiholder, who comes to his Tenement by surrender of the Lessor, be such an Assignee as may have an Action of debt or Covenant by the Statute of 32 Hen. 8. Secondly, admitting he be not within the Statute, whether by the Common Law (Covenants being made by express words with the Lessor his Heirs and Assignes) the Assignee for these Covenants may maintain this Action. This Case was moved by Hennage Finch for the Plaintiff, and by Crawly for the Defendant, Et adjurnatur. 4 H. 222. Post. 44. 2 Cr. 305. Co. 5. 16. b. Post. 44.

Knight *versus* Harvy, Administrator of Harvy, Hill. 22. Jacobi Rot. 635.

DEbt brought Hillary Term, anno 22 Jacobi, upon an obligation of eleven pound, dated vicesimo Maii, anno vicesimo Regis nunc. The Defendant imparles. And in Easter Term, primo Caroli Regis, the Declaration and Plea of the Defendant was entred, and he declared therein upon an obligation dated 20. Maii, anno 20 Regis nunc. Afterwards, by order of the Court the said Declaration was amended, and made Regis Jacobi: And the Defendant pleaded thereunto a Judgment upon another bond of 100. l. dated anno quarto Regis nunc; (which was mistaken, for it ought to have been Regis Jacobi) and that he had *Riens en ses mains*, but only to satisfie that Judgement; and thereupon the Plaintiff joyns issue, That the said recovery was made by Fraud and Covine, and found for the Plaintiff; and this Term the Defendant moved in arrest of Judgement, That this plea is repugnant and impossible, That a recovery should be anno quinto Regis nunc; And therefore the issue, joyned thereupon is nought, and no Judgement can be given in this case: But all the Court conceived, That for as much as there was a default in the Defendants Plea, although the Plaintiff had joyned issue thereupon, which is found to be false, and the Defendant hath not confessed Assets in his hands, but only for that Judgment: Yet the Plaintiff having a good Declaration shall have Judgment; whereupon it was adjudged for the Plaintiff. 18. Co. 5. 43. a. Post. 78. 54. Ante. 7. 2 Cr. 86.

Sir Edward Coke Sheriff of Buckinghamshire his Case.

SIR *Edward Coke* late Chief-Justice of the *Common-Bench*, & afterwards of the *Kings Bench*, and removed from his places, being made Sheriff of the *County* of *Buckingham* had a *Dedimus potestatem* to take his oath annexed to a Schedule: To which he took exceptions, for that there were more Additions to the said oath than 19.

were in the ancient oath, which is in the Regiſter, and afterwards confirmed and appointed by the Statute of 18. *Ed.* 3. He therefore conceived there ought not to be ſuch Additions unleſs by Parliament. The Additions were, Firſt, *That he ſhould ſeek to ſuppreſs all Errours and Hereſies commonly called Lollories, and ſhould be aſſiſtant to the Commiſſaries and Ordinary in Church matters:* Which part of the oath was added by reaſon of the Statute of 5. *Rich.* 2 & 2. *Hen.* 4. *cap.* 15 whereby it is appointed that the ſame ſhould be taken by the Sheirff, eſpecially for thoſe two cauſes. But he thereto certified. That thoſe Statutes are repealed by the Statutes of *primo Edwardi ſexti* & *primo Eliz.* & therefore ought not to be taken. The ſecond Addition was, *That he ſhould return reaſonable iſſues*, whereto he excepted, becauſe it is appointed by the Statute, & penalties impoſed for not performing it; & it ought not to be upon oath. The third Addition was, *That he ſhould return all Juries of the neareſt and ſufficienteſt perſons*, whereto he excepted, becauſe that part of the Oath is not appointed by any Statute; and it is againſt common practice, that he himſelf ſhould return Juries, it being commonly done by the Under-Sheriff, who is alſo appointed by the Statute to be ſworn. The fourth Addition was, *That he ſhould cauſe the Statute of Winton, & the Statutes againſt Rogues & Vagabonds to be put in execution*, whereto he excepted, becauſe the Statute of *Winton* is altered, & the Statutes againſt Rogues & Vagabonds are appointed to be executed by the Juſtices of the Peace, & not by the Sheriff. Upon theſe Exceptions the *Lord Keeper* aſſembled all the Juſtices, to confer with them about the ſame. And as touching the firſt point they conceived it was fit to be omitted out of the Oath, becauſe it is appointed by Statutes which are repealed, & were intended againſt the Religion now profeſſed & eſtabliſhed, which before was condemned for Hereſie, & is now held for the true Religion. For the ſecond Addition they conceived it convenient, & for the ſervice of the King & Subjects, & the greater part of them were of opinion; That an Oath in this, & the other points, may be well injoyned by the King & order of State without Parliament; & it may be well impoſed upon the Sheriff to take, being for publique benefit & execution of the Laws. For the third Addition, it is not ſo ſtrictly to be intended, That he himſelf ſhould return Juries, but it ought to be intended according to the conſtruction of Law, That he himſelf by himſelf, or Under-Sheriff, ſhould return Juries, which is a ſufficient performance; for the Law ſaith *Qui per alium facit, per ſeipſum facit.* For the fourth Addition, it reſts upon the former reaſons, That this Oath being appointed and continued divers years by direction of the State, although without the expreſs authority of any Statute Law, yet may he well be continued for the publick benefit, in repreſſing ſuch perſons: And although authority be given to the Juſtices of the peace to put thoſe Statutes in execution, yet it doth not take away the Sheriffs right, who is the publick Conſervator: And ſo they delivered their opinions to the *Lord Keeper* at his houſe at *Reading*.

Memorandum,

Memorandum, That the last of this Term; there came a Writ from the King to the Justices of the Common-Bench, commanding the Court to be adjourned *from Reading to Westminster* in the County of *Midd.* and that all Pleas and Proceeding should be adjourned to *Westminster*, to be held there the day of *Octabis Hillarii*; (And like Writs were directed to the Justices of the Kings Bench and Berons of the Exchequer) and it was openly read there, and then the adjourment made accordingly of all Pleas, &c. unto *Westminster*, &c. 20. Ante. 13. Ante. 13.

Termino Hillarii, anno primo *Caroli* Regis,

in Communi Banco.

1. MEmorandum, That in this Vacation *Sir Henry Hobert Knight and Baronet*, Chief-Justice of the Common-Bench, dyed at his house in *Blyckling* in the County of *Norff.* being a most learned prudent, grave and religious Judge.

Sir Richard Udall *versus* William Tindall, Vicar of Alton, Hillarii 22. Jacobi Rot. 733.

2. Hutt. 77. Benl. 159. TRespass, for taking two loads of Woad, upon Not Guilty pleaded, a special Verdict was found, That if Woad be Minutæ Decimæ, then the Jury found that the Defendant is not guilty; If it be not Minutæ Decimæ, then they find for the Plaintiff: and it was argued by Henden Serjeant for the Plaintiff, and by Bridgeman for the Defendant; and on the behalf of the Plaintiff it was said, That in as much as it is so found, without more circumstances, it shall not be intended to be Minutæ Decimæ, for it may be that a great quantity of Woad may be sown, and the greatest part of the commodity of the Parish may consist in Woad, and then it cannot be reputed Minutæ Decimæ; for although in their own nature they be Minutæ, yet they now become Majores, if the greatest part of the profits of the Parish consists therein. For Minutæ Decimæ are properly intended such, which are but of small consideration in a Parish, as herbs in a Garden, and such like; Therefore he said that Woad sown in the field is not Minutæ Decimæ: And that in tertio Jacobi upon a special Verdict in Esser betwixt Hertman and Boxley, it was resolved, That Tythe of Welde (which is a kind of grass growing amongst other grain, and commonly sown therewith) were not Minutæ Decimæ. But Bridgeman for the Defendant vouched the Dean and Chapter of Norwich's Case, Paschæ 43 Elizab. where it was adjudged upon a special Verdict, That the Tythes of forty acres of land planted with Saffron, appertain d to the Vicar and not to the Parson. But Henden answered, That was not because they were Minutæ Decimæ; but for that upon the Endowment found, the Allegation was that the Parson should have Tythe of Corn and Hay only: But Yelverton said That was not the reason, but because they were accounted as Minutæ Decimæ, and appertained to the Vicar: And all the Justices resolved, That Woad growing in nature of an Herb, the Tythe thereof ought to be reputed for Minutæ Decimæ, and Judgment was given for the Defendant.

3 Cr. 467. Moor 909.

Mary

Mary Peacock, Executrix of Richard Peacock, *versus* Steere.

RAvishment de Gard, The Plaintiff declares, That one John Steere, held such land of the Testator by Knights service, and died, his Heir within age; and that the Testator seized the said Ward and died thereof possessed, and afterwards the Defendant ravished him, The Issue being upon the Tenure, was found for the Defendant, and the question was, upon the Statute of quarto Jacobi Regis capite tertio, Whether the Plaintiff shall pay any costs? because she counts, That she brings her Action upon her own possession, And Hutton, Harvy and my self held, That the Defendant shall not have costs; But Yelverton, è contra: vide Mich. duodecimo Jacobi, betwixt Goldsmith and the Lady Platt, & Mich. tertio Jacobi, betwixt Havers and Dacre, And Mich. 38, & 39. Eliz. betwixt Fetherston and Allybard. Hutt. 3. 78. Post. 219. 2 Cr. 229. 361 3 Cr. 503. 2 Cr. 350.

Termino Paſchæ, anno ſecundo *Caroli* Regis, in Communi Banco.

Crumpe *verſus* Barne.

ACtion for words, Whereas the Plaintiff was a Citizen of Glouceſter, and ſo had been for twelve years, & uſed all that time the trade of a Shoomaker, That the Defendant to defame him ſpake theſe words of him; He is a Bankrupt Rogue. After verdict upon Not Guilty pleaded and found for the Plaintiff, It was moved in arreſt of Judgment, That theſe words were not actionable; For, Bankrupt is not ſpoken indefinitely, nor abſolutely by it ſelf, but as an adjective to Rogue; ſo the words are extenuated. Alſo a Shoomaker is not ſuch a perſon as may have an action for theſe words, no more than a labourer or huſbandman: for he doth not live upon buying & ſelling, or upon credit, but upon his manual labour. But it was reſolved, That the Action lyes: For the addition of Rogue to Bankrupt doth not extenuate but aggravate it, & ſhews his malice; And a Shoomaker is ſuch a perſon as is within the Statute of Bankrupts; for he lives by his credit in buying Leather, and ſelling it again in Shoos, &c. and not upon his manual labour only, as labourers and husband-men do. Whereupon it was adjudged for the Plaintiff. 1. 2 Cr. 345. 3 Cr. 268.

Foſter *verſus* Smith.

ASſumpſit, Whereas The Defendant was indebted to the Plaintiff in ſeven pounds, That in conſideration thereof, he promiſed to pay, &c. The Defendant pleaded, Non aſſumpſit, and found againſt him; And it was moved in arreſt of Judgment, That the Declaration is not good; For he doth not ſhew any cauſe of the debt, viz. by Bond or otherwiſe; And although he hath pleaded Non aſſumpſit, and it is found againſt him, yet the Declaration being ill, the Verdict doth not ayde it; It was therefore adjudged for the Defendant. 2. Lib. 10. 77. 2 Cr. 207. Ante 6.

Anne Smith

Anne Smith *verſus* Anne Lady Wade, Executrix of Sir William Wade.

3. Hutt. 81. ASſumpſit upon a promiſe of the Teſtators; After Non Aſſumpſit pleaded, and Verdict found for the Plaintiff, it was moved in arreſt of Judgment, That the Writ and Declaration were againſt Anne Executrix of Sir William Wade, and the Iſſue, Record and Venire facias were accordingly, for a Tryal betwixt the ſaid parties; but being tryed by a Niſi prius writ in London, the Writ of Habeas Corpora was to have Corpora Juratorum &c. betwixt the ſaid Anne Smith and the Lady Wade, Executrix of Sir Henry Wade Knight; So a miſpriſon of Henry Wade for William Wade, Co. lib. 3. b. and therefore it was moved in arreſt of Judgment, that it was a Co. 5 43. a. Tryal without warrant; for the Record of Niſi prius, and the Iſſue being againſt the Executrix of William Wade, the Habeas Corpora was not ſufficient, being by Niſi prius to try that Iſſue. But all the Court conceived, that in as much as the Iſſue is good, the Record of Niſi prius good, the Venire facias good according to the Iſſue, although there be a miſpriſon in the Habeas Corpora, it was 2. Cr. 14. 354. 396. but the fault of the Clerk, and may be well amended. Becauſe there is not any alteration of the Verdict, and it is well warranted by the former Record; therefore it was appointed to be amended, and adjudged for the Plaintiff.

Swayne *verſus* Rogers, in the Exchequer Chamber.

4. Benl. 172. TReſpaſs for Battery in the Kings Bench, and Judgment for the Plaintiff, Error in the Exchequer Chamber was aſſigned, for that the Judgment was Capiatur, whereas the Battery was before the general Pardon, ſo as the Fine is pardoned, and the Judgment ought not to have been a Capiatur, for the Court is to take notice of the Pardon and give Judgment for the party, but not any Fine, Sed non allocatur, for the Court needed not to take Poſt. 449. 2 Cr. 149. Dier. 28. a. conuſance thereof without demand of the party, and it doth not appear whether the party be any of the perſons excepted, or one who is to have benefit of the Pardon: But afterwards it was ſhewn that the Declaration was of Aſſault, Battery, and Impriſonment, and the Defendant as to the Battery pleads a Juſtification, whereupon the Plaintiff demurred; and as to the Impriſonment he pleads another Juſtification, whereupon the Plaintiff takes Iſſue, De Injura ſua propria, &c. and Iſſue joyned; and at the Tryal the Jury found as to the plea for the Battery, That the Defendant did it de Injuria ſua propria, and aſſeſſed Damages five pound, and Coſts forty ſhillings, whereas they ought not to have medled therewith, becauſe a Demurr was thereupon; But only have found conditio- Poſt. 143. nal Damages if it ſhould be adjudged for the Plaintiff: And for the Impriſonment they did not find the Iſſue, but aſſeſſed conditio-

nal

nal Damages twenty ſhillings; ſo they found merly croſs to what they ought, and the Judgment upon this Verdict for the five pound Coſts and the forty ſhillings found by the Jury, nullo habito reſpectu of the twenty ſhillings was merly erronious; wherefore, although it was prayed that it might be amended, it appearing to be the miſpriſion of the Clerk who entred the Judgment, yet Non allocatur; But the Judgment was reverſed, Poſt. 143.

Smith *verſus* Richardſon, in the Exchequer Chamber.

ERror upon an Aſſumpſit in the Kings Bench, wherein the Plaintiff declared, Whereas in conſideration the Plaintiff had ſold to the Defendant four bags of Hops, whereof three bags weighed ſeptem centenas & unum quarterium centenæ, Anglice, ſeven hundred & one quarter of an hundred weight, & the other bag weighed ducentas centenas & dimidium unius centenæ, Anglice, two hundred and an half weight; That the Defendant aſſumed to pay according to the rate of ſeven pounds for every hundred of the ſaid three baggs, and according to the rate of ſix pound ten ſhillings for every hundred of the other bag, Et dicit in facto that the foreſaid three bags according to the ſaid rate amounted to the ſumm of fifty pound and fifteen ſhillings; and the foreſaid other bag according to the rate aforeſaid, attained to ſixteen pounds five ſhillings, yet the Defendant aforeſaid, &c. The Defendant pleaded Non aſſumpſit, and found againſt him, and damages given only according to the ſaid rate before mentioned, and Judgment entred; and thereupon a Writ of Error was brought in the Exchequer Chamber, and the Error aſſigned was, for that ducentas centenas & dimidium unius centenæ, Anglice, two hundred and an half weight, &c. This Anglice is void and repugnant to that which the Anglice was before, and contrary to the propriety of the words. For ducentas centenas is two hundred hundred, ſo it is much more than the price reacheth unto, and it is without ſenſe, and therefore repugnant, and the Declaration ill, and Judgment erronious: But all the Juſtices and Barons held that it was no Error, being in diſadvantage to the Plaintiff and not material; for it reſts only in damages, and the Jury hath given according to that rate, ſo as there is not any prejudice to the Defendant; and the iſſue being upon Non aſſumpſit and found as is alledged, it is good enough, and Judgment was affirmed, 5. Bent. 156. Co. 10. 133. a. Poſt. 386. 418.

A Caſe out of the Court of Wards.

UPon the eleventh of May, this Term all the Juſtices and Barons being aſſembled, the Chief Baron propounded a Caſe depending in the Court of Wards, viz. two Joynt-Tenants to them and their Heirs; the one of them makes a conveyance to the uſe of himſelf & his Wife for a Joynture, and the advancement of his Son. 6.

Whether this be an aſſurance within the Statutes of 32, and 34. *Hen.* 8. ſo as the King ſhall have the third part. Sir *Randolph Crew*, the Chief-Juſtice, and the Chief-Baron, were divided in their opinions from the other Juſtices & Barons in this point, who all, upon that ſuddain motion, conceived it to out of the Statutes: For the words
Co. 8. 163. b. are *If any ſole ſeiſed, or joyntly with others*, &c. there in ſuch caſes the Staute provideth, That the King ſhall have the third part upon ſuch conveyance; But where two are joyntly ſeiſed to them & their Heirs, & the one makes a conveyance: this is out of the words of the Statute of 32. *Hen.* 8, & therefore ought not to be within the intent of 34. *Hen.* 8. for that is a Statute of Explanation, & ſhall be conſtrued only according to the words, & not with any equity or intendment: For there cannot be an Explanation upon an Explanation, as it is held in *Butler & Bakers Caſe in the Lord Cokes* 3. *Rep. fol.* & *Jones* ſaid it was ſo reſolved *in the Court of Wards* by the opinion of the Chief-Juſtice *in anno* 43. *Elizab.*

7. *Memorandum*, At the ſame time another Queſtion was moved amongſt them, where Judgment is given in *debt* at the grand Seſſions in Wales, againſt a Defendant, inhabiting in one of thoſe Counties & the Defendant dyeth inteſtate, & one who inhabits in London takes letters of Adminiſtration. Whether any execution may be in Wales, becauſe he neither inhabits nor hath any thing there; & if not, then whether that Record may be removed into the Chancery by *Cerciorari*, & ſent by *Mittimus* into the Kings-Bench or Common-Pleas, to the intent to take forth a *Scire facias* upon it, to have lands out of Wales (or goods in the hands of the Adminiſtrator lyable to it there) And all the Juſtices & Barons conceived *Que nemy*; for he may not have a *Scire facias* in any Court, but where the Judgment is given; & if ſuch courſe ſhould be uſed, all Judgments in the Courts in London or in inferiour Corporations, would be removed & executed here, which would be a great inconvenience to the Subjects, to make lands or perſons lyable to ſuch Judgments in other manner than they were at the time of the Judgments: Wherefore there is no remedy, but to execute ſuch Judgments in their peculiar Juriſdictions.

Crane *verſus* Crampton.

2. Hutt. 80. ACtion upon the Caſe *Sur* Aſſumpſit, That the Defendant in conſideration of a Ruff-band delivered unto him by the Plaintiff, promiſed to pay unto him, at the day of the ſaid Plaintiffs Marriage, the ſumm of three pounds, and alledgeth in facto that he was marryed ſuch a day, Et licet ſæpius requiſitus, yet he hath not paid: Judgment given *Sur* nihil dicit, and after Writ of inquiry of damages executed in Noſſ. it was moved in arreſt of Judgment, That the Declaration was not good, becauſe he doth not ſhew that he gave notice of his Marryage before he marryed, for

for otherwise the Defendant is not bound to take notice thereof; for it rests in the privity and knowledge of the Plaintiff, and not of the Defendant. And it cannot be a breach of promise unless the Defendant hath notice given him before the Marriage; also the payment ought to be after request, and the day of request ought to be mentioned, for licet sæpius requisitus will not serve; and it appears not that the request was after Marriage; for request before will not serve, but Hutton, Harvey, and Yelverton conceived it was good enough. For the Defendant at his peril ought to take notice, and the Plaintiff needs not shew that he gave notice of the Marriage; and postea requisitus sufficeth, without shewing the day of the request. But I doubted thereof, For a President was cited of one Morse in the Kings Bench, where for not alledging notice, the Judgment was reversed; but notwithstanding this exception Judgment was given for the Plaintiff.

P. 139.
2 Cr. 183.
2 Cr. 405. Yelv. 168.
Post. 385. Cr. 102. 183. 229.

Lacon *versus* Barnard, Attorny. Hillar. 20. Jac. Rot. 850

UPon a Bill of *Trover* and *Conversion* of one hundred Sheep, shewing that the Plaintiff upon the twenty fifth day of March anno 19 Jacobi Regis was possessed of those goods and lost them, and that upon the last day of April they came to the Defendants hands, who the same day sold and converted them to his proper use; the Defendant for eleven of them pleaded Not Guilty, Et quoad the 89 residium he pleaded, That the Plaintiff at another time, viz. upon the eighteenth day of September anno 19. Jacobi Regis, prosecuted an original Writ out of the Chancery, returnable in this Court, against the Defendant, and one Brian Smith quare ceperunt & abduxerunt 100. oves, and thereto they appeared, and the Plaintiff counted against them of their taking of an hundred sheep upon the fourteenth day of April, anno 19 Jacobi Regis; and thereto they pleaded Not Guilty for the eleven sheep, and for the eighty nine residue, they pleaded a recovery in debt, by the Defendant, against Edward Hatcliff of a debt of sixty pound, and that the said Edward Hatcliff was then possessed of the said eighty nine sheep, and that by virtue of a Fieri facias those goods were sold unto him, whereupon he took them into his custody. The Plaintiff thereto replyed, and took issue and found for him, and damages assessed to two pence: And thereupon the Plaintiff had Judgment of the said two pence damages, and had six pounds for Costs, and averrs that the said taking and driving, for which the recovery in trespass was had, and the conversion of the said eighty nine sheep in this Action be all one, and that the said Judgment is yet in force. To this plea the Plaintiff replyes, that true it is, he brought such an Action, and recovered the two pence for the taking and driving of the said eighty nine sheep, and six pounds for Costs; but he further saith, that the said two pence damages was not assessed for the value of the said sheep and the conversion of them, and that the said Defendant

9. Hutt. 81. Sty. 201.
2 Cr. 73.

at the day and year in the Bill, ſold the ſaid eighty nine ſhæp and converted them to his own uſe. The which converſion is the ſame converſion, whereof he now complaineth, and traverſeth, That the ſaid taking and driving, in the ſaid Action, whereupon the Judgment was given, is the ſame Treſpaſs, quoad the converſion of thoſe goods whereof the Plaintiff now declareth. And upon this Replication the Defendant demurred generally, and it was now argued at the Barr by Serjeant Crew for the Defendant, and by Serjeant Henden for the Plaintiff; and after the ſaid arguments at the Barr; it was reſolved by Hutton, Harvy, and my
Poſt. 90. ſelf, That this Replication is good, and that the Plaintiff ought to recover. For the damages of two pence given for the eighty nine ſhæp being ſo ſmall, is in it ſelf an implication (and the Court ſhall ſo intend it) that it was given only for the taking and driving of them, and that the Plaintiff had them again, and not in lieu of the value of them; for if it ſhould be given for the value of them, then the Plaintiff ſhould thereby loſe the property in them, and have nothing for his ſhæp but two pence, and the Defendant ſhould have the ſhæp: But the Law will rather intend (and ſo it may be averred) That thoſe damages were given only for the taking and driving, and that the Plaintiff had them again, and afterwards loſt them, and that the Defendant found, and after converted them, &c. and this demurrer is a confeſſion that he converted them after the ſaid taking and driving; for the action of Treſpaſs is ſuppoſed to be upon the fourteenth day of April in the nineteenth year of King James, and the *Trover* and *Converſion* in this Action is ſuppoſed to be upon the thirtieth day of April the ſaid nineteenth year of King James, which well ſtand with the former Action: for the Defendant may take and chaſe them one day, and the Plaintiff recover damages for the chaſing, and after loſe them, &c. And this firſt Action is brought for the firſt taking and chaſing, and the ſecond for the converſion, ſo both may ſtand together, which is now confeſſed by the Demurrer, and that the damages were given for the firſt taking and driving, and not for the converſion; therefore they conceived the Plaintiff ſhould recover; but Yelverton held, becauſe the Action of Treſpaſs is Cepit & abduxit, therefore it includes that the Defendant had them, and *ouſted* the Plaintiff of the poſſeſſion. And although the damages be ſmall, it ſhall be intended to be given for the ſhæp; and if ſo, then he cannot have an Action for converting them afterward, vid. 11, Rich. 2. Title Treſpaſs 207. 40. Ed. 3. fol. 27. 46. Ed. 3. fol. 18. 14. Hen. 7. fol. 12. 44. Ed. 3. fol. 2. But Judgment was given for the Plaintiff,

Termino

Termino Trinitatis, anno ſecundo *Caroli* Regis, in Communi Banco.

Crips *verſus* Gryſil. Trin. primo Car. Rot. 1932.

1. EJectione firmæ of lands in Leighton-Buſſard of the demiſe of Robert Key, upon a ſpecial verdict the caſe was, That John Gryſil, Father of the Defendant, was ſeized in Fee of the ſaid Lands, and upon the tenth day of October, anno 16. Jacobi Regis, by Indenture of Feoffment, mortgaged them to Peter Key and his Heirs, upon condition, if he or his Heirs paid to Peter Key and his Heirs one hundred and fifty pounds, upon the twentieth day of October anno domini 1624. that he might re-enter. That afterwards upon the thirtieth day of March anno 1619. the ſaid Peter Key, by his Will in writing, gave to Robert Key all his Goods, Moneys, Bills or Bonds, Mortgages or Specialties for Moneys, and made him his Executor, and dyed; and that the one hundred and fifty pound not being paid, Robert Key entred and let to the Plaintiff: and without argument the opinion of the Court was, That theſe words All my Mortgages, made a good deviſe of the lands mortgaged; whereupon Judgment was given for the Plaintiff. Poſt. 447. 450. Mo. 59.

Reymund *verſus* Hundred de Oking.

2. ACtion upon the Statute of Winton, Whereas one Palmer the Plaintiffs Servant was robbed within the ſaid Hundred, of fifty eight pounds of the Plaintiffs moneys by perſons unknown, and had made Hue and Cry according to the Statute, and none of the Theeves were taken; and the ſaid Palmer had made oath before ſuch a Juſtice of peace of the ſaid County next adjoyning to the ſaid Hundred, within twenty days before this Action brought, That he did not know any of the parties who robbed him, That the ſaid Hundred had not made him any recompence. Upon Not Guilty pleaded, and tryed at the Barr this Term, and found for the Plaintiff, it was moved in arreſt of Judgment, that this Action lies not, becauſe the Plaintiff himſelf was not ſworn. That he knew not any of the parties who did the Robbery; for it is not ſufficient that the Servant who was robbed was ſworn, for by the Statute of 27. of Eliz. the party who brings the Action ought to make the oath; and it was argued that the Servant who was robbed ought to have brought the Action, and then his oath would have been ſufficient; but

but when the Maſter brings the Action, he himſelf ought to be ſworn that he knew not any of the Robbers, otherwiſe he might not bring it, and therefore the Action lyes not. But it was reſolved by the Court, That the Action well lyes for the Maſter, and that the Servants oath was ſufficient; for it is properly in his notice that he was robbed, and did not know any of the Robbers, and the Maſter knows not that he was robbed, or who were the perſons, but by report of his Servant; and it would be inconvenient if the Maſter ſhould not bring the Action, but the Servant only, for the Servant might releaſe or compound, or diſcontinue the Suite, and ſo the Maſter ſhall have the loſs by his falſhood; therefore the Maſter ſhall bring the Action, and have his Servant, who was robbed, be his Witneſs; whereupon it was adjudged for the the Plaintiff, See Coke book of Entries, where ſuch Action is brought by the Maſter, and the Servant ſworn.

R. 493. 2 Cr. 224. Poſt. 336 3 Cr. 142.

Sir Robert Baniſters Caſe.

3. DEbt for not ſetting out Tythes, upon a ſpecial Verdict the caſe was. A Parſon made a Leaſe of his Rectory Anno nono Elizab. for ſixty years, which was confirmed by the ſucceeding Biſhop, and ſucceeding Patron, neither of them being Biſhop or Patron at the time of the Leaſe. Reſolved per totam Curiam, That it was good according to the opinion in Newcombs Caſe in the Lord Cokes 5. Rep. fol. 15. And ſo without argument it was adjudged for the Plaintiff.

Ayleſworth *verſus* Chadwell, in the Exchequer Chamber.

4. ERror of a Judgment in Debt, upon an Obligation in the Kings Bench, the firſt Error aſſigned was, That the parties being at Iſſue, The awarding of the Roll was of a Venire facias returnable die Martis poſt craſtin. Purificationis. And the Venire facias was made returnable, die Sabbati poſt octabis Purificationis. The ſecond Error was, That the Venire facias did bear date the twelfth day of February, and was returnable die Sabbati poſt octabis Purificationis, which is before the Teſte. Sed non allocantur, it being a judicial Proceſs, and the fault of the Clerk, ſhall be amended. And thereupon Judgment was affirmed.

Poſt. 90. 2 Cr. 64. Co 8. 161. b. Dier. 129. a.

Browne *verſus* Taylor, Hillary 22. Jac. Rot. 1669.

5. EJectione Firmæ, of a Leaſe of Sir John Savil and others, of lands in Stapleton, Upon Not Guilty pleaded, It was found for two parts for the Defendant, And a ſpecial Verdict for a third part. That one Holgate was ſeized of theſe Tenements, holden by Knights ſervice, And in Anno 21. Jacobi, infeoffed Spencer and others to the uſe of himſelf for life; and after his deceaſe, to the uſe of

of such person or persons as he should appoint by his Will, for such interests, or otherwise, as in his said Will should be specified. Afterwards he makes his Will in writing, and thereby deviseth that all his Tenants of his Farms, shall enjoy their tenements for twenty one years after his decease, And that R. T. shall have the rent out of his land for his life, payable at two Feasts of the year. And deviseth to his wife all his Lands in Stapleton for her life; Whether this be a good declaration of the uses, to limit it to his wife? and that she shall take it by the feoffment, or whether by the immediate devise? (And then the devise is void for a third part, because the lands are holden in Capite) was the Question. And after argument at the barr (without any at the bench) Hutton, Harvie and Yelverton agreed, That they should take by the devise, and not by declaration of the uses. For they held, That after the feoffment in this manner, he hath a qualified fee in him, as owner, so as he may make his will of those lands, and devise the rent as owner thereof. And then the land being held by Knights service, The devise is void for a third part. Or he may declare his Will, as upon the feoffment, which shall inure as a Declaration of the uses upon the feoffment, and then all the land passeth. So that here, when he makes this Will, without reference to the feoffment, the Law will construe it as the Will of one who is owner, and may dispose of it as owner, and not as Declaration of the uses, which is an Authority only: Also the Will appoints rents to be paid, which is a good Will and Devise, but the Authority limits him, That he may not appoint any rents to be paid. And to have it to be a Will for one part, and to dispose as by authority for another part, cannot be good in Law, therefore it shall be adjudged as a Will to inure for both; But I doubted thereof, and conceived it might be well construed as a Declaration, And thereby it shall be a good limitation for all the lands, And that by the said Authority, he might dispose of the rent out of the land; And his declaring that his Tenants shall hold their Farms for twenty one years after his decease, cannot be but by Declaration; And it is more for the advantage of the parties, that it should be so construed; And the Law shall expound for the greatest benefit of the parties, when by any construction it may be: And by this means all the parts of the Will may take effect: But the three other Justices held, That he could not dispose of the rent, by reason of the said words, but of the estate of the land only: Whereupon, without any argument, they adjudged for the Plaintiff. See Lord Cokes 6. Rep. fol. 17. & 18. Sir Edward Cleeres Case, & 10. Rep. fol. 85. Lovies Case.

Co. Litt. 271. b.

Co. 6. fol. 18. a.

Termino

Termino Michaelis, anno ſecundo *Caroli* Regis, in Communi Banco.

Love *verſus* Playter. Paſchæ. 2 Car. Rot. 386.

1. ACtion for words, whereas the Plaintiff is, and had been an Attorny of the Common-Bench for thirty years. That the Defendant to deprave him, ſpake theſe words, Thou art the diſhoneſteſt Attorney in England, & if any be more diſhoneſt
Mo. 62. than thou art, he deſerves to be hanged. After Verdict upon Not Guilty pleaded, it was found for the Plaintiff, and now moved in arreſt of Judgment, That theſe words be not actionable, becauſe he doth not ſay, that he was diſhoneſt in his practice, as Attorney: And it may be in other matters: Alſo he doth not averr, That there were any diſhoneſt Attorneys in England; And the Court ſhall not intend it, without ſhewing thereof. And a Precedent was cited betwixt Walter and Brown; Thou art as very a Thief as any is in England, and he did not averr that there was any Thief in England. No Judgment was there given for the Plaintiff; whereupon the Court would further adviſe. But there was no Judgment given herein, for the parties agreed.

Thomas Windſor and the Inhabitants of Farnham in Chancery.

2. NOte upon a reference out of the Chancery, betwixt *Thomas Windſor* & the Inhabitants of Farnham, to Sir *Randolph Crew* Cheief Juſtice, Sir *John Walter* Chief Baron, Sir *William Jones*, & *to my ſelf*, The ſole Queſtion being, whether a Decree made by Commiſſioners unpon the Statute of 43. *Eliz. Regin. of charitable uſes*, *cap.* 4. & exceptions put in againſt it in Chancery, & there examined, heard, and confirmed in part and altered in part, may now be re-examined *upon bill of Review*, as other bills of Review, upon De-
N.R. 38. Poſt. 351. R.N. 195. crees in Chancery. And it was reſolved by all of us, That this bill of Review is not allowable, but the Decree in Chancery is concluſive, and not to be further examined, becauſe its takes its authority by the Act of Parliament; and the Act doth mention but one Examination; And it is not to be reſembled to the caſe, where a Decree is made by the Chancellor, by his ordinary authority. And *Jones* ſaid, That ſo it is upon a Decree made upon the Statute of 37. *Hen.* 8. by the major part, and confirmed by the Chancellor, which is not re-
Poſt. 351. examinable: And ſo thoſe opinions were certified in Chancery.

Tutter

Tutter *verſus* Inhabitantes de Dacorum & Caſhio.
Trin. 2. Caroli, Rot. 1717.

ACtion upon the Statutes of Winton, 27. Eliz. cap. 13. of Hue and Cry, alledging the Robbery to be committed at Shelp and Ridge, in diviſis Hundredorum de Dacorum & Caſhio in Com. Hertf. and that he made Hue and Cry, and gave notice of the Robbery at South-Mimms, within the County of Midd. nèer the Hundreds aforeſaid, and ſhews all other circumſtances according to the Statutes. The Defendants plead Not Guilty; and found againſt them; And now moved in arreſt of Judgment, that this Declaration is not good; for he alledgeth the notice to be given at South-Mimms within the County of Midd. which is in another County, from that where the Robbery was committed: And he doth not ſay prope locum ubi roberia facta fuit, but prope Hundredorum, which may be ten miles from the place where the Robbery was done: And then it is not according to the Statute of 27. Eliz. which appoints it to be given nèer the place where the Robbery was done: And divers preſidents were ſhewn to that purpoſe, viz. Trin. 30. Eliz. Rot. 1425. and Hillary 36. Eliz. Rot. 506. And likewiſe the words of the Statute of 27. Eliz. cap. 13. were inſiſted upon, That none ſhall have Actions upon thoſe Statutes, except the ſaid perſons, ſo robbed, with as much convenient ſpeed as may be, give notice of the Robbery to ſome of the Inhabitants of ſome Town, Village, or Hamlet, neer the place where any ſuch Robbery ſhall be committed And ſo, not being alledged that notice was given to the Inhabitants, nèer the place where the Robbery was committed, it was ſaid not to be good. But on the other ſide it was urged, That the Allegation, that notice was given to the Inhabitants in a Village out of the County, is clèrly good, being nèer the place where the Robbery was committed; for a Stranger cannot know the diviſion of the Counties, and ſo it hath bèen ruled here: And the Allegation that South-mimms is nèer the Hundred, is good enough, and may be well intended in the diviſion where the Robbery was done; eſpecially, it being after Verdict, and that the Jury would not have found the Defendants guilty, unleſs it had bèen ſo proved. And a preſident was cited, anno quinto Jacobi in the new book of Entries, fol. 348. where an Action was brought againſt the Hundreds of Langtrée and Crawthorn, and the Robbery was alledged to be at Tozlton in diviſis Hundredorum prædictorum, and notice and Hue and Cry were alledged to be at Cyrenceſter in the diviſion of the Hundreds aforeſaid, And the Plaintiff after Verdict had Judgement, and upon view of that preſident all the Court conceived the Declaration to be good enough, and that the Hue and Cry being alledged to be made out of the County, was not material, being nèer the place where the Robbery was done, which place being alledged to be nèer the diviſion of the hundred aforeſaid, ſhall be intended nèer

3.

Poſt. 379.

2 Cr. 675.

Poſt. 379.

the diviſion of the Hundreds where the Robbery was done, and not at the moſt remote place thereof, for that ſhould be a foreign Intendment, But it ſhall be good either way; and the beſt courſe is to alledge it to be at the place where the Robbery was committed, or at the Village, nèr the place thereunto: But prope diviſis ſhall be ſo intended, eſpecially after Verdict: wherefore it was adjudged for the Plaintiff. vide Paſc. ann. 21. Jacobi, Rot. 488. in Banco Regis, betwixt Foſter & the Hundred of Spelthorn & Iſtleworth, ſuppoſing the Robbery to be made apud Bodſom, prope diviſis Hundredorum prædictorum, & alledges the Hue & Cry was made, & notice given to the Inhabitants of Hatton, prope diviſis Hundredorum prædictorum; and yet adjudged for the Plaintiff.

2 Cr. 675.

Rowden *verſus* Malſter. Trin. 18. Jac. Rot. 1051.

4. Godb. 367. 1 Rol. 838.

TReſpaſs for entring into lands in Menewden: Upon Not Guilty pleaded, a ſpecial Verdict was found, That George Sterling a Copy-holder in Fée of the Mannor of Menewden anno 39. Reginæ Elizab. ſurrendred it into the hands of two of the Tenants of the ſaid Manor, to the uſe of his Will, and had iſſue two Sons, John and Henry, and deviſed the ſaid copy-hold land to John and the Heirs Males of his body, the Remainder to Henry and the Heirs Males of his body, with Remainder over, &c. And afterward dyed, That this ſurrender was after in anno 41. Elizab. preſented by the Homage, and John the eldeſt Son admitted thereto, Habendum to him and his Heirs; And afterwards John had iſſue three Sons, and ſurrendred the ſame to the uſe of his Will, and thereby deviſed it to Katharine his Wife for her life, and dyes, And that in anno 43. Reginæ Elizab. the ſaid ſurrender was preſented, and ſhe admitted; Afterwards the three Sons of the ſaid John dyed without iſſue; And they further find, That no Copy-holder may ſurrender, or deviſe his Copy-hold lands in tayle. And that afterwards the ſaid Katharine married J. S. who lets to the Plaintiff for a year, who entred accordingly, And the Defendant by the command of Henry *ouſted* him, Et ſi ſuper totam materiam, &c. The ſole Queſtion was, when a Copy-holder in fée ſurrenders to the uſe of one in tayle, there being no cuſtome to warrant ſuch an entayl, whether it be an Eſtate tayle by the Statute of Weſtm. 2 de Donis conditionalibus, or a Fée-ſimple conditional at the Common-Law: And it was argued at the Bar, and after ſolemnly at the Bench, becauſe it was a general cauſe, and might concern divers Copy-holds: And Yelverton the puiſny Juſtice held, That it was an Eſtate tayle, by the equity and intent of the Statute de Donis Conditionalibus, although it were not within the expreſs words thereof: For in all Statutes made for the good of the Common-wealth, and wherein no prejudice accrues to the Lord or Tenants, by reaſon of the alteration of any Intereſt, Service, Tenure, or Cuſtome of the Manor, there the general

Bo. lib. 3. f. 8. a.

words

words of such Acts of Parliament do extend to Copyhold lands. As the Statute of Merton cap. 1. which gives damages to a *Feme covert* upon a Recovery in a Writ of Dower, where the Baron died seised, extends to Copyholds: And the Statute of Westminster the 2. cap. 3. & the three several branches of that Statute; The one which giveth the Cui in vita upon a discontinuance made by the Baron; The second which giveth the receipt unto the *Feme* upon her Barons refusal to defend the Wives title: And the third which giveth a Quod ei deforciat to particular Tenants, extend to Copyholds; and the Statute of 32 Hen. 8. cap. 9. against *Champerty*, & buying of litigious Titles, and cap. 28. which giveth an entry in lieu of a Cui in vita extendeth to Copyholds, because these Statutes are beneficial to the Common-wealth, and not at all prejudicial to the Lord in the alteration of Tenure, Estate, Services, &c. as the Case cited in Coke 4. Report fol. 26. & 30. proves, and from whence he inferred the same conclusion, That this Statute de Donis Conditionalibus, being made for the general good of all, and the extending it to Copyholds, was no way prejudicial, either to the Lord or Tenants, and therefore they are to be intended within the equity and meaning thereof: Otherwise a *Formedon in descender* would not lye of a Copyhold, which none can have but Tenant in tail, and a Remainder limited upon such an estate, hath been allowed, and therefore is no fee conditional: For neither upon a fee absolute or conditional, can a Remainder in tayle by any means depend; And as to that objection, that a Copyholder in fee cannot hold of the Donor, but must hold of the Lord: He said, That he might well hold of the Donor, as Coke lib. 11. Rep. Sir Henry Nevills Case. f. 17. b. where we find, that a Manor was held by Copy of Court Roll, & had other Copyholds under it, to hold thereof, And by the same reason Tenant in tayle of a Copyhold may hold of his Donor, and he shall hold over of his Lord. And as to the objection which was made, That if an Estate tayle should be allowed in Copyholds, there would be a perpetuity maintained: So as it could not be cut off, he said, it might be cut off by a recovery in the Court of the Manor, as the books are in 23. Hen. 8. Brook recovery in debt 27. and 19. Hen. 6. 64. & 26. Hen. 6. 6. and Plowd. Commentaries 59. And he said he knew no reason, but a Copyhold might as well be intayled, as Titles of honour, which concern the person of a man, or a Villain, or liberty of Franchise; And if Copyholds might not be intailed, it would deprive them of one of those priviledges, which any man who hath an Inheritance, ought to have, viz. where a gift is to him, and the Heirs Females of his body, if he hath a Son, his Daughters shall not inherit: And for that he vouched 37. Hen. 8. Done 61. and said, there were many Presidents and Authorities, that Copyholds might be intailed, and cited Littleton fol. 16. § 76. Plowden, Manxels Case, fol. 215. Hen. 8. Tenant in tayle by Copy of Court roll 24. & anno 3. Mariæ, Dyer 192. & the old book of Entries 129. where are two Presidents,

Co. lib. 3. 9. a. 2. Inst. 343.

Co. lib. 4 26 a Co. Litt. 369. b

Co. 9. 105. 2.

Co. Litt. 58. b. 2 Cr. 260. com.

Co. Litt. 60. b

Co. Lit. 2. 4. B.

Co. Litt. 56. b.

the one in 3. Hen. 8. the other in 29. Hen. 8. But on the contrary it was argued by the three other Juſtices, Hutton, Harvy, and my ſelf, That this was not an eſtate tail by the Statute of Weſtminſter the ſecond, de Donis Conditionalibus, but a Fee-ſimple conditional at the Common-Law, And then the Plaintiff hath a good title, And that the ſurrender to the uſe of his Wife for life, being after iſſue had, ſhall give to her an Eſtate for life, and is good, as well againſt the Donor as his Iſſue. For when an Act of Parliament altereth the Service, Cuſtome, Tenure, Intereſt, of the land, or other thing in prejudice of the Lord or Tenant, there the general words of ſuch an Act, ſhall not extend to Copyholds; as the Statute of Weſtminſter the 2. cap. 20. which giveth the Elegit, extendeth not to Copyhold lands, becauſe it would be prejudicial to the Lord, and a breach of the Cuſtome, That any ſtranger ſhould have intereſt in the lands holden by Copy, without the admittance and allowance of the Lord. And the Statute of 27. Hen. 8. cap. 10. of uſes, toucheth not Copy-hold, becauſe the tranſmutation of poſſeſſion, by the ſole operation of the Statute, without allowance of the Lord, would tend to the Lords prejudice. And the Statutes of 31. Hen. 8. cap. 1. & 32. Hen. 8. cap. 32 whereby joyntenants, and tenants in common are compellable to make partition, extend not to Copy-holds, And the Statute 32. Hen. 8. cap. 28. which confirmeth Leaſes for twenty one years, made by tenants in tayle, or by the husband and wife, of the lands of the wife, touch not Copy-hold lands. For that Statute warrants only the leaſing of ſuch lands as are grantable by Deed; but ſuch are not Copy-hold lands: For though by the Lords licenſe they may be demiſed by Indenture, yet in their own nature they are demiſable only by Copy, and therefore out of the generall Purview of that Statute. And for the ſame reaſon, the Statute of triceſimo ſecundo Henrici octavi, cap. 34. which giveth an entry to the grantee of a reverſion, upon the breach of a condition by the particular tenant, toucheth not Copy-hold. So here in this Caſe we held, That the Statute of Weſtminſter 2. cap. 1. of Intailes did not extend to Copy-holds, becauſe it would be prejudicial to the Lords. For by this means the tenure would be altered, for the Donee in tayle, without any ſpecial reſervation ought to hold of the Donor by the ſame ſervices that the Donor holdeth over. And he who comes in by Surrender, and the admittance of the Lord, to hold to him and the heirs of his body, cannot hold of him who ſurrendred, but ſhall hold of the Lord, and is tenant at will unto him, and ſhall do the ſervices unto him as Lord, Vide 2. Ed. 4. 6. 4. Hen. 6. 17. 41. Ed. 3. 45. & 45. Ed. 3. 19. Secondly, we held, That in reſpect of the baſeneſs of their eſtate, the Statute never intended to provide remedy for them nor their alienations. For the words of the Statute are, Quod voluntas Donatoris in charta ſua manifeſte expreſſa de cætero obſervetur, which proveth, That the intent of the makers of the Statute was, That no hereditaments ſhould

1 Rol. 838.

Co. lib. 3. 8. a. Moor. 128.

2 Inſt. 397. Co. lib. 3. 9. a.

Infra. 45. 4.

Ant. 24. 25. 2 Cr. 305.

should be entayled within this Statute; but such as either was or might be given by Charter or Deed: but Copy-holds are no such hereditaments, and therefore not within the meaning of that Act. And for that were cited Littleton fol. 16. 21. Hen. 6. 37. 11. H. 4. 8. 2 Hen. 4. 12. 13. Rich. 2. *Faux Judgment* 7. 14. Hen. 4. 34. 7. Ed. 4. 19. 21. Ed. 4. 50. Coke 4. Rep. fol. 21. And we also held that Copy-holds could not be entayled, because Copy-holders at the time of making the said Statute, and for divers years after, were only tenants at will of the Lord, and the Lord might have *ousted* them, and they had no remedy unless in Chancery. Thirdly if Copy-holds might be intayled, then the perpetuity of such estates must be mainted; for a fine cannot be levyed of Copy-hold lands to bar the Intayle, nor can a recovery in value be intended, of such an estate where warranty cannot be annexed unto it; also many other mischiefs would ensue thereupon, as well to the Lord, as to the Copy-holders themselves; for then the Tenants could not provide for their wives and children, nor make Leases to others for years, to bind their issue, with the Lords Licens; and Lords would lose the wardship of their Tenants in such Manors where by custome they belong unto them; and there would not be so often changes of Tenants as before, whereby Lords would lose their Fines. Lastly we held, That neither estate tayle, nor estate tayle after possibility of issue extinct (which hath a necessary dependance upon an estate tayle) can by any particular custome be allowed. For no estate tayle was before the Statute de donis conditionalibus, but all inheritances were either fee-simple absolute or conditional, and the Statute being made in Anno 13. Regni Regis Edwardi primi, which is within time of memory, no custome can have commencement since then: For then a custome might begin within time of memory, which is repugnant to the rules of custome; and in proof thereof were cited 34. Hen. 6. 36. Coke. 4. Rep. fol. 87. Coke 5. Rep. 52. And in answer to the authorities vouched we said, There were none which mentioned Copy-hold lands to be either within the words of the Statute of Donis cond. or within the equity thereof; besides, Plowden in Manxells Case, And that the general current of opinion in all our books is, That an estate in Copy-hold lands, if limited to a man and the heirs of his body, is a fee-simple conditional at the common-Law, and so Littleton and the Cases there cited ought to be intended, and agreeable hereunto are the resolutions in the Lord Coke. 3. Rep. fol. 7. Heydons Case, & 9. Rep. fol. 105. Whereupon it was adjudged for the Plaintiff.

Supra 44.

Co. Litt. 60. a. b.

Co. 3. 8. a.

1 Rol. 838.

Co. Litt. 60. b.

Post. 83.

Richard Hodges, Administrator of Thomas Hodges, *versus* Thomas Moyse and John Scriven.

ACtion upon the Case, whereas the Plaintiff in such a Court of Piepowders held at Glocester, secundum consuetudinem Civitatis illius, brought an Action of debt of 200 l. against William Hodges

Hodges, and thereupon the ſaid William Hodges, by due proceſs of the ſaid Court, was arreſted, and under cuſtody of the Defendants Sheriffs of Glocester, according to the cuſtome there, untill he ſhould find bayl, that they permitted him to go at large, ſo as he hath concealed himſelf, and not anſwerrd him his debt. Upon Not Guilty pleaded, and found for the Plaintiff, It was now moved in arreſt of Judgment, That this Action lies not: Firſt, becauſe it is not alledged, That the Court is there held at Glocester by Cuſtome, or Charter, and then it is cléer they hold Court without authority, and their Proceſs idle, and the Defendants not chargeable: Secondly, becauſe a Court of Piepowders hath no authority
2 Cr. 313. to hold Pleas, but for Contracts or Batteries in Markets and Fairs, and not for debts. And to that purpoſe were cited Coke 10. Rep. fol. 73. a. b. & 8. Rep. fol. 133. a. Turnes Caſe. Thirdly, in pleading a Recovery in an inferior Court, it ought to ſhew by what
2 Cr. 532. Co. 8. 133. a. authority the Court is held, whether by patent or preſcription; for otherwiſe they had no authority, & the recovery void: And all the Judges conceived, That the Court being ſtiled a Court of Piepowders (which is a Court incident to Fairs and Markets, and
2 Cr. 313. for Cauſes only ariſing within them) ſhall not be intended a Court, unleſs it be ſhewn to be held by Charter or Preſcription;
Moor. 849. And that the Sheriff, who is to take advantage thereby (he being an Officer of the Court, and arreſting the party) ought to ſhew it. As Stewards when they make any Certificates out of inferior Courts, ought to ſhew therein how the ſaid Courts are
2 Cr. 184. holden, for they know beſt their own authority, and the ommiſſion thereof is juſt cauſe to reverſe and annull all their procéedings: But otherwiſe it is in the caſe of a Stranger, as here, where the ſtile of the Court is but an inducement to his Action; And theſe words, Secundum conſuetudinem Civitatis, being in the Imparlance Roll, the Court was of opinion, that the omiſſion of them in the Iſſue Roll (whereupon the Tryal was had) was but vitium Clerici, and might be amended: For the Imparlance Roll is the
Poſt. 92. principal and guide to the other, And that the addition thereof would not alter either the Iſſue or Verdict: And accordingly it was amended and adjudged for the Plaintiff. Vide 13. Ed. 4. 8.

Baldry *verſus* Packard. Trin. 2. Caroli Rot. 617.

9. PRohibition, Whereas the Plaintiff ſued him before the Commiſſary of the Biſhop of Norwich for Defamation, in which Suit he had ſentence, and ſix pounds aſſeſſed for coſts, and the Defendant appealed from the ſaid Sentence, to the Court of Arches; And all this was depending in an. 1622. And by the general Pardon anno 21 Jacobi, the offence of the defamatory words were pardoned, which was pleaded in the Court of the Arches, and that not withſtanding they procéeded in the appeal, where the firſt Sentence

tence was reverſed, And in that Suit ſixteen pounds aſſeſſed for coſts to the appellant, where by Law they ought not to have proceeded, nor given any coſts. A Prohibition was prayed, and it was thereupon Demurred: And after argument at the Barr, debated and reſolved by the Court, That here was no cauſe of prohibition. For, although the pardon hath diſcharged the offence of the defamation quoad any puniſhment, to be inflicted by way of penalty, or otherwiſe; yet in reſpect of the coſts in the firſt ſuit, which be not diſcharged by the pardon (being aſſeſſed before the day to which the pardon relates as it is agreed in Halls Caſe, Coke lib. 5. fol. 51 b) if they be not duly aſſeſſed, the Court may well proceed in the appeal, to diſcharge the party of them; and if they reverſe the firſt Sentence, ſo as it appears the coſts were unduly taxed, and the party unjuſtly vexed, they may well in the appeal aſſeſs coſts; for the Pardon doth not extend to ſtop the Suit commenced in the appeal; nor by reaſon of the pardon had they cauſe to ſurceaſe that Suit; and although the coſts in the appeal, be aſſeſſed after the pardon, yet they are well aſſeſſed, the cauſe of thoſe coſts not being taken away by the pardon: Whereupon Conſultation was awarded, but Hutton doubted hereof: For the pardon diſcharging the offence (which is the principal) he conceived they ought not to have proceeded for the coſts.

Poſt. 114. Ante. 9. Poſt. 199. Poſt 68. 2 Cr. 149. 335. Poſt. 68.

Gee, Biſhop of Chicheſter, *verſus* Freedland. Paſch. primo Caroli Rot. 607.

REplevin upon a diſtreſs taken in Allingland Park upon demurrer, the Caſe was this: The Biſhop of Chicheſter was ſeiſed in fee of the ſaid Park, Jure Epiſcopatus, and had the office of Parkerſhip, which the Biſhop granted to the ſaid Freedland for life, and alſo granted unto him for the execution thereof, an annual rent of three pounds ſix ſhillings and eight pence, una cum liberatura of thirteen ſhillings four pence by the year, together with Paſturage for two horſes in the ſaid Park yearly, & the windfalls in the Park, with clauſe of diſtreſs for the ſaid rent of three pounds ſix ſhillings eight pence, and the livery of thirteen ſhillings four pence in all the poſſeſſions of the Biſhoprick in the ſaid County, which was confirmed by the Dean & Chapter: And for Non payment of the ſaid rent of three pounds ſix ſhillings eight pence, the Defendant took the diſtreſs, and averrs the office and the fee of three pounds ſix ſhillings eight pence to be ancient, but doth not make any ſuch averment for the reſidue. The Plaintiff in barr of the Avowry confeſſeth the grant, and pleadeth the Statute of primo Eliz. cap. And that the ſaid paſturage for two horſes never was granted before, and that the Biſhop who made the grant thereof dyed, &c, and the Plaintiff was elected Biſhop, whereupon it was demurred, The ſole Queſtion was whether this grant of the office, with the ancient fee of three pounds ſix ſhillings eight pence confirmed

7. Bridg 26. Ley 71. Poſt. 557. Ant. 16. Ant. 16.

confirmed by the Dean and Chapter, be good, to bind the Succeſſor, notwithſtanding the Statute of primo Elizab. or void only for the things added in the grant, or if the addition of thoſe new things, ſhall make all the grant void againſt the Succeſſor. After argument at the Barr, it was argued at the Bench, and held by Hutton and Yelverton that the grant was good for the office, and the ancient fee of three pounds ſix ſhillings eight pence, being in a ſeveral grant by it ſelf, and not conjoyned or mixed with the other grants, and then the one may be good, and the other void: but if the grant had been of the fee of five pounds, where the other fee was only three pounds ſix ſhillings eight pence, becauſe it is intire in the grant, it would have been void for all; But here the grant for the rent is one by it ſelf, and the grant of the paſturage is another, and diſtinct by it ſelf, and the one doth not depend upon the other; ſo it may be good for one and void for the other: And althought the grant for the paſturage is void againſt the Succeſſor, yet the rent may be good; And Hutton ſaid, That if the Biſhop had granted the office and rent for him and his Succeſſors, and had granted the paſturage only during the time that he ſhould continue Biſhop, and ſo had diſtinguiſhed them in his grant, there had been no Queſtion, but both had been good; and as he by his expreſs limitation might have limited them, and they ſhould have been good; ſo the Law ſhall make conſtruction, that the one is good againſt the Biſhop himſelf, the other againſt the Biſhop and his Succeſſor; And the one being ill and void againſt the Succeſſor, ſhall not deſtroy that which is good; for utile per inutile non vitiatur: And although the office it ſelf, is not within the words of the Statute of primo Elizab. yet it is within the equity thereof. The Offices of Parkerſhip and Stewardſhip, and other Offices which are of neceſſary uſe for the Biſhop, are admitted and allowed to be grantable, although they be new Offices, and new Fees, if they be reaſonable; (and of the neceſſity of them, and of the reaſonableneſs of the fees, the Court ſhall adjudge): And therefore in Hillary Term anno 10. Jacobi. Regis Rot. 758. in the Common Bench in the Caſe of the Biſhop of Ely, where the Biſhop of Ely the twentieth of April primo Elizab. Regin. (which was preſently after the Statute) granted the office of the Keeping of his Houſe and Garden, with the fee of three pounds per annum to another for his life, which was afterwards confirmed by the Dean and Chapter. Although there were not before any ſuch Office, yet being a neceſſary Office, and the fee reaſonable, it was adjudged good againſt the Succeſſor, and not reſtrained by the Statute of primo Elizab. And although it hath been objected, That the livery or fee of thirteen ſhillings four pence, and the Windfalls, be not averred to be ancient, yet Hutton conceived, it ſhall be intended they were ancient, when the contrary is not averred, eſpecially when nothing is alledged on the other part to be new, but the paſturage. And the Avowant diſtraining only for the three pounds ſix ſhillings eight pence, needed not to aver any other

Poſt. 557.

Dier. 80. Co. 10. f. 61. b.

Benl. 137.

other to be ancient, then the rent which was in question: And if one grant had been of that office and ancient fee of three pounds six shillings eight pence, & another grant pro meliore exercitione ejusdem officii, (and for his better maintenance) of the livery, thirteen shillings four pence, and the pasturage and windfalls. These being by such several grants, the first should be good, being distinct by it self, and the other should be void; so by construction of the Law it shall be taken here as several grants, rather than the grant shall be destroyed: But Yelverton agreed, That if he had granted the Office for life, and had further granted for the executing thereof these fees following, viz. the rent of three pounds six shillings eight pence, the livery or thirteen shilling four pence, the pasturage and windfalls; and so put together the ancient rent and new addition, the grant should be void in all, because they be all in one Sentence. But here being in several Sentences, the one not depending upon the other, it may be good for the one, and void for the other, against the Successor: Whereupon they concluded Judgment ought to be given for the Avowant; but it was argued by Harvy and my self, That Judgment ought to be given for the Plaintiff: For it is agreed on all parts, That the Statute of primo Elizab. was made for the benefit of the Successor, That his possessions might not be charged to impoverish him; wherefore all estates and grants which are to the prejudice of the Successors, are void. And true it is, That grants of ancient Offices, with their ancient fees, which are confirmed by the Dean & Chapter, are made good by the intention and equity of the Statute; and that they shall have Officers reasonable, with reasonable fees, although they be not warranted by the words of the Statute, it being within the purview intent and meaning thereof as Coke 10. Rep. fol. 61. the Bishop of Sarums Case, which is the reason that a grant of rent or annuity pro consilio impendendo is restrained by the intent of the Statute, although it be not within the words, because the Successor is thereby impoverished and prejudiced, as by the books of 22. Elizab. Dyer 370. Cok 10. Report in the Bishop of Salisburies Case, the Case of Bolton there cited, and Coke 5. Rep. fol. 15. and that grant of ancient Offices are taken to be within the intent of the Statute, and are to be allowed, appears, because in another Statute, made the same Parliament of primo Eliz. cap. 4. Ancient Offices are coupled with Leases reserving the ancient rent made by the Bishop. But although grants of ancient Offices may be allowed for necessity, yet they ought not to be with a new addition, of a new charge upon the Successor, to impoverish him; and therefore it ought to be granted as usually it had been, and not otherwise: For it is at his peril who takes such a grant, That he doth not take a new addition or alteration; and therefore if an Office usually granted for one life, be granted for two lives, or if it be granted for life, reversion for life, and confirmed by the Dean and Chapter, it is void against the Successor, as well for the first life as for the second, because it is not

Post. 61. 280.

Post. 259.

granted according to the uſual courſe; and although one of the Tenants holds it during the life of the Biſhop, who granted it, yet not being good at the time of the grant, the ſubſequent Act ſhall not help it. So this addition of the new charge makes the grant void, as in the Lord Montjoy's Caſe 5. Rep. fol. 4 Leaſe for years of land uſually demiſed, and of other land not demiſed before, reſerving the ancient rent for the land formerly Leaſed, and twelve pence for the land not uſually let, which was the full value: Yet it was reſolved that the Leaſe was not good, by reaſon of that addition; and although it hath been ſaid, That the livery and paſturage are diſtinct clauſes, from the firſt grant of the rent, and not depending upon, nor conjoyned with it, ſo that the rent may ſtand, and for the other it ſhall be void; it was anſwered, That it appears fully they be one intire grant, and not ſeveral: For the rent is granted una cum liberatura, or thirteen ſhillings four pence, & una cum paſturagia, which is a Copulative, and one Sentence. See the books 8. Hen. 7. 4. and 38. Hen. 6. 34. in the Abbeſs of Syons Caſe: And for the thirteen ſhillings four pence or livery, it is conjoyned in one clauſe of diſtreſs, with the rent of three pound ſix ſhillings eight pence, ſo as they be but one grant, and upon one conſideration; but if they had been in another clauſe, or that for another conſideration, he had granted the ſaid livery of 13. s. 4. d. and paſturage; then the grant might ſtand for the one, & be void for the other: And where it hath been objected, That the livery and windfalls, although they have not been ſufficiently averred to be the ancient Fees, yet may well be ſo intended; for as much as the contrary is not ſhewn on the other ſide. It was anſwered, That the Avowant (becauſe he is to make his title) ought to averr the ſeveral things granted to be ancient fees to the Office, otherwiſe the averring that the one is ancient, doth imply that the other is not ancient: For a Plea ſhall be taken moſt ſtrong againſt him who pleadeth it, and in proof thereof (& Plowd. Commentaries 46. & 103. and Coke 1. Rep. fol. 46. and 5. Rep. fol. 9. in Brudenels Caſe; And it ſufficeth the Plaintiff to allege that any of them is a new addition, and he needeth not to allege the reſidue to be new, for then peradventure it would be double. Alſo, for the principal point in the Caſe; The additions trench to the prejudice of the ſucceſſors, and this Statute hath been always conſtrued to redreſs the miſchief which was at the common-Law, upon Grants confirmed by Dean and Chapters in charge, or to the prejudice of the Succeſſor, and to make them void, as appears. Coke 5. Rep. fol. 2 & 3. And Michaelm. 40. & 41. Elizab. betwixt Scambler and Wats, where two offices of Steward or under-Steward of a Manor, uſually granted ſeverally, with ſeveral Fees, were held void for both. Alſo to both offices the ancient fees are appendant, and parcell of them, and ſhall paſs by Grant of the Office cum pertinentiis: But thoſe Fees newly added, cannot be ſaid appertaining, nor parcel, to be recovered by aſſiſe, as the Caſe in Coke 8. Rep. fol. 49. b.

Co. Litt. 44. b. Lib. 6. fol. 37.

Co. Litt. 303. b. Lib. 3. f. 59. a.

2 Vent. 198

3 Cr. 636. 637.

Jehu

Jehu Webbs Case, and the book of 39 Assise fol. 4. proves: Therefore the Grant being of more than was anciently granted, was void. And to expound this Grant of the Office with new fees, to be good for all, during the time that the Grantor is Bishop, and to be afterwards good in part, & void in part, against the Successor; & so to make fractions of Grants, is against the exposition of Grants, and against all former constructions and interpretations of this Statute; And therefore they conceived, That this Grant was void in all ab initio, quoad the Successor, and the Plaintiff ought to have Judgment. Court divided.

Robert and William Eyres against the Executrix of Christopher Eyres, in Chancery.

IN a suit in Chancery, this case was made, & referred to the *Master of the Rolls, Justice Doddridge, Justice Jones, & my self*, & to *Sir John Ward* & *Doctor Lee Masters of the Chancery & Civilians.* *Christopher Eyres* the Testator *anno* 15. *Jacobi Regis* made his Will in writing, & thereby devised Legacies to charitable uses, & to the Plaintiffs *Robert & William Eyres* his Brothers, to the one two hundred pounds, & to the other one thousand pounds, & divers other Legacies to his other Kindred, & made his Wife Executrix, saving that he appointed his said two Brothers to be conjoyned with her as Executors in trust for his Wife, for performance of his Will: & afterwards *anno* 22 *Jacobi*, he being sick & sending for Mr. *Damport* Parson of the Parish, & for Mr. *Stone* a Reader of the Temple; they when they came, demanded of him what Friend he thought best to be his Executor, to take care of his Funerals, & see his Will performed? & whether he trusted any person more than his Wife? he answered, That his Wife was the fittest person, & therefore should be his sole Executrix. Being then moved by Mr. *Stone* to give Legacies to his Father, Brethren, & Kindred, he answered, he would not give or leave them any thing, but he bequeathed to *Lionell Atwood* his Godson twenty or thirty shillings; & being thereupon requested by his Wife to give him a greater Legacy, he answered her, *Thou knowest not what thou doest, do not wrong thy self, thirty 30's is money in a poor bodyes purse:* And for others he left them to his Wives discretion or disposition; & the Testator did speak these words, or the like in effect; *Animo testandi & ultimam voluntatem declarandi*: And all this was set down in a Codicill, & the first Will & that Codicill proved *in communi forma*: And whether this Codicill were a revocation of the first Will, for the Legacies given to his two Brothers, now Plaintiffs, was the question; & after divers arguments, as well by the Civilians as common Lawyers, it was resolved by them all, & so certified under their hands, That they conceved it was not a revocation of the said Legacies; but they did not certifie their reasons. The principal reasons of their said resolution were, because ther was an absolute & formal Will made in his health, & there being

13.

Ow. 76.

2 Cr. 115.

no ſpeech made by him of his former Will, nor of the Legacies thereby deviſed to his Father, Brothers, and Kindred, nor that he ſeemed to remember his former Will. That anſwer to a doubtful queſtion, ſhall not take away the Legacies deviſed before; For *non conſtat* what his intent was in uſing thoſe words; for it may be his meaning was not to give more than he had given before, or that he would not give more at that time, by that Will, & *non conſtat*, That he heard all the words, when he was moved to give to his Father, Brethren, and Kindred; and he anſwering, I will not give them any thing, *non conſtat* what he intended by thoſe words: and therefore upon ſuch doubtful ſpeeches, to nullifie a Will adviſedly made,
2 Cr. 115. without cleer or perſpicuous revocation, or words which *tant amount* ſhall not be permitted: Alſo the Civilians affirmed, that there is an expreſs Canon; there cannot be a revocation of Legacies amongſt Children, without preciſe mentioning the firſt Will, and Legacies given thereby to the Children; & they ſaid, the Law is taken to be ſo, when he hath not any Children, and deviſeth Legacies to his Brothers; and there doth not appear any cauſe of miſdemeanour, to provoke him to revoke his Will, nor do his words import any ſuch intention. So upon theſe opinions, the Lord Keeper being aſſiſted with the Maſter of the Rolls, & the ſaid three Juſtices, decreed the ſaid Legacies to the Brothers, the ſaid Codicil not having made any revocation of them.

9. *Memorandum* upon Friday being the tenth day of November, Sir *Randolph Crew* Chief-Juſtice of the Kings-Bench was diſ-
Poſt 65. 375. charged of that place, by writ under the great Seal, for ſome cauſe of diſpleaſure conceived againſt him, but for what, was not generally known.

Powell et Ux. *verſus* Plunket, in the Exchequer Chamber.

10. ERror in the Exchequer Chamber of a Judgment in the Kings Bench, in an Action by Plunket for theſe words ſpoken by the Wife; Mr. Plunket did ſteal my Plate out of my Chamber. The Defendants pleaded that they were poſſeſſed of ſuch plate, which was ſtoln out of their Chamber, and the ſuſpecting the Plaintiff to have ſtoln it, ſpake thoſe words, and it was demurred thereupon, and ajudged for the Plaintiff; and this Error aſſigned, That the Declaration was not good, for a *Feme covert* cannot have plate, but it is the plate of her Husband, ſo the words are inſenſible, and not actionable: But it was reſolved by all the Juſtices and Ba-
2. Cr. 600. rons, that the Action well lies; for although ſhe may not have plate, ye it is in common ſpæch well known, That the Wife accounts her husbands goods her goods, and ſo what ſhe intended by thoſe words is a great ſlander, and the juſtification cleerly ill; for ſuſpition is no good cauſe to juſtifie the ſpeaking ſuch words; Whereupon the Judgement was affirmed.

Morris

Morris *versus* Fletcher, in the Exchequer Chamber

ERror of a Judgment in the Kings Bench in an Assumpsit, where the Plaintiff alledged, That in consideration he would marry the Defendants Daughter, the Defendant would pay for the Wedding Apparel; and the Plaintiff alledged, that he married the Defendants Daughter, and provided for her two Gowns, and two Pettycoats, and that the Defendant licet sæpius, &c. the Defendant demurred upon the Declaration and Judgment given for the Plaintiff. The Errors assigned were, First, That he ought to pay only for one Wedding Gown and Pettycoat, which she used upon her marriage day, and not for more; and intire damages being given, the Judgment was erronious: But all the Justices and Barons conceived, That Wedding Apparel is to be taken according to the common parlance, for apparel to be used upon the Wedding day, and time of feasting, which is commonly for some dates after, according to the dignity of the persons; and therefore the declaration was held good, and the damages well assessed. The second Error assigned was, the Defendant appeared by John Green his Attorney, in octabis Hillarii anno 22. Jacobi Regis, whereas the said John Green was dead before the day which was alledged to be confessed by pleading, In nullo est Erratum, sed non allocatur, for it is an Error assigned against the Record; and although it was said there ought to have been a special demurrer for that cause, yet it was held, that the In nullo est Erratum, alledged against the Demurrer, extends to the three Errors assigned in the Writ of Error. The third Error was, That the Writ of Inquiry of damages was awarded returnable Die lunæ post quinden. Hillarii primo Caroli, and the Sheriff returned the inquisition taken before him 27. die Januarii, which was after the day of the return of the Writ, and so without authority; But for as much as it was not assigned upon the Record although in truth it were so, the Court would not take conusance thereof: And it may be that die lunæ post quinden. Hillarii, was the 28. or 29 day of January, and then the inquisition is well taken, and so it shall be intended; and if not, the Court shall not take notice thereof, unless it had been assigned; Whereupon the Judgment was affirmed. 11. 2 Cr. 11. 12. 1. Rol. 525. 2 Cr. 548. 3 Cr. 210. Yelv. 35.

Edward Davie *versus* John Hawkins, in the Exchequer Chamber.

TRespas of his Close breaking and depasturing whith his Cattle. The Defendant justifies, for that one Will. Birchmore was seized in fee of a Messuage and Tenement in D. and he and all those whose Estate, &c. the said Edward Davie had in the said Tenement, had used common, (and so mistakes Edward Davie for William Birchmore) and that the said William Birchmore let those Tenements 12.

Tenements to the Defendant, who put in his Cattle upon the Common; the Plaintiff replies and traverſeth, abſque hoc. That the ſaid William Brichmore,& omnes illi quorum Statum prædictus Edwardus habuit in Tenementis, &c. and ſo miſtakes Edward for
Ant. 25. p. 78. William) and thereupon iſſue joyned in the ſame manner, and the Verdict found, That the ſaid William Birchmore,& omnes illi quorum Statum idem Edwardus habuit non habuerunt communiam prout, &c. Judgment was given for the Plaintiff, and Error thereof brought in the Exchequer Chamber, and this matter aſſigned, that it is a vain preſcription, and none ought to preſcribe in the party, in whoſe right common is clamed in him, or his Anceſtors, &c. And to alledge a Que Eſtate in the party, is idle and repugnant, and the Verdict finding it, is void in it ſelf; And ſo the Judgment given thereupon was erronious, but it was moved,
Ant. 25. that it was but a miſpriſion of the Clerk, and the Defendant may not take advantage of his own inſufficiency in his plea, and prayed that it might be amended according to the Caſe of Sir Anthony Cook in 9.Eliz.Dyer.260.11.Hen.7.2. But Sir John Walter Chief-
2 Cr. 435. p. 90. 190. Baron, Yelverton, my ſelf, and others, conceived it could not be amended, becauſe it is in matter of ſubſtance in all the proceedings, and in the Verdict, &c. but Hutton and others doubted thereof, whereupon the Defendant in the Writ of Error, for his expedition, and that he might proceed de novo, moved by Mr. Tylor his Counſel, That it ſhould be reverſed, and ſo without further argument it was reverſed.

Player *verſus* Warn and Dews, in the Exchequer Chamber.

8. Jones 242. 1 Rol. 217. ACtion upon the Caſe *Sur Trover & Converſion* of 2000 loads of Coals. Upon Not Guilty pleaded, the Defendants were found guilty ſeverally, for ſeveral loads of Coals, and were found ſeverally not Guilty for the reſidue, and judgment accordingly, and intire coſts, and one ideo in miſericordia againſt the Defendants,
Poſt. 178. 1 Rol. 217. and one ideo in miſericordia againſt the Plaintiff, pro falſo clamore; And thereupon a Writ of Error was brought in the Exchequer chamber, and the Error aſſigned; Becauſe the Judgment was againſt both the Defendants, for the ſeveral damages ſeverally: For it was alledged that ſeveral damages ought not to have been aſſeſſed; but there being a joynt Trover and Converſion layed to their charge, they ought to have been both found Guilty, and they ought not to have been divided in the Verdict and in the aſſeſſing of damages; and if they might be ſevered, yet the Plaintiff ought to have but the damages given againſt one of them as it is in Sir John Heydons Caſe Coke Rep.11.fol.5. b. & 44. Ed.3. 7. But all the Juſtices and Barons agreed, That the Plaintiff ſhould have ſeveral damages; for being found ſeverally guilty of ſeveral parcels converted, he ſhall have Judgment accordingly, and it is not like Sir John Heydons Caſe, where there was but one

one joynt and sole tresp̃as of Battery, and so found, and there, al- Post. 193. 243.
though the damages were severally assessed, yet the Plaintiff 2 Cr. 118.
ought to take his Judgment for damages but of one: But when the Tresp̃as is several, and so found; as in this Case, viz. the one at the one time, and the other at another, although it be contrary to the suppos̃al of the Writ, yet being found by verdict, it shall not abate the Writ, and the Plaintiff shall recover according to the Verdict, as it is said there in Heydons Case: So here this being severally found, and the conversion by them severally, of several Post. 242.
things, the damages are well assessed severally, and he shall have 3 Cro. 860.
Judgment against them severally for damages, according to the Verdict: And it was said, that there were divers p̃sidents in the Kings Bench, and Common Bench, to that purpose. The second Error assigned, was, That there ought to have bẽn several Judgments de ideo in misericordia against the Defendants, and being otherwise it is Error: But against that it was also resolved, That there shall be one Judgment only of Misericordia although Co. 11. 43. a.
the Defendants be severally found guilty, and so are the P̃sidents. Post. 178.
Whereupon the Judgment was affirmed, Vid. 44. Ed. 3. 6. & 6. 9. Hen. 6. 12. Assises 76.

Sir John Bennet *versus* Doctor Easedale.

14.

AN *Assise* being brought by Sir *John Bennet*, for the office of Chancellorship of the Arch bishop of York, the Defendant endeavoured to obtain an injunction out of the Star-chamber to stay his the said Sir *John Bennets* Suit, he having lately by Sentence & Decree there (for bribery and other misdemeanours in his office of Judge of the Prerogative Court) been fined twenty thousand pound and censured to be imprisoned, and made incapable of any office of Judicature. By reason whereof being disabled to hold that office in question, the Defendant obtained it, and pretending, this Assise was brought by Sir *John Bennet*, that he might enjoy the said office contrary to the Decree; he therefore prayed to stay his proceedings; Whereupon Sir *John Bennet* having day given him to shew cause, why an Injunction should not be granted, shewed then a pardon from the late King after the said Sentence, wherein was recited all the bribery and offences contained in the said Decree, and all penalties and punishments by reason thereof, and all disabilities and incapacities, and all things concerning the said Sentence, except the said fine of 20000 l.; and thereupon the Court of Star-Chamber requested Sir *John walter*, Chief Baron, and Sir *Francis Harvie* (third Justice of the Common Pl. s) to call unto them all the Justices and Barons, and to consider of the said Decree, and Pardon, and to certifie their opinions, whether it were fit to permit the proceedings in the Assise or not; and all the Justices and Barons being assembled at Serjeants Inne, the Sentence and Pardon were read before them, and the case argued by Counsell on both sides; and it was resolved by the Justices

Juſtices and Barons, That this pardon hath taken away all force of the Sentence in the Star Chamber, except for the Fine of 20000 l. and all inabilities are diſcharged thereby,& that the Sentence never took from him the office, but the execution thereof, nor gave authority to place others:But if the Archbiſhop,before the Pardon and after the Sentence, had appointed him to execute his office, and he durſt not do it; then peradventure the ſaid Archbiſhop, for his *non-attendance*, might have ſeiſed the ſaid office,and have granted it to another; but the Sentence by it ſelf cannot take away the office, which is a Freehold; and the pardon having taken away all the offences, they therefore conceived it convenient to permit him to proceed with his Aſſiſe, and if doubtful, it may be found ſpecially, and ſo receive a judicial hearing.

Co. Lib. 9.f. 50i.
Co.Litt.233.b.
Poſt. 65.

15. *Memorandum* after the death of Sir *Henry Hobert* Knight and Baronet, Chief Juſtice of the Common Bench, Sir *Richard Hutton* ſate as Prime Judge all *Hillary Term* following, and in both the Terms of *Paſchæ* and *Trinity*,untill the laſt day of *Michaelmas Term, viz.* 28. *Novembris ſecundo Caroli*, when Sir *Thomas Richardſon* was made Chief-Juſtice of the ſaidCourt,& all the Writs which iſſued the ſaid *Michaelmas Term* from *Quindena Sancti Martini* unto the end thereof, did bear Teſte as well under the name of the ſaid Sir *Richard Hutton* as of the ſaid *Tho. Richardſon.*

Termino Hillarii, anno ſecundo *Caroli* Regis, in Communi Banco.

Hearn *verſus* Allen, Trin. 22. Jac. & Hill. 1. Caroli, Rot. 1876.

1. Hutt. 85.

EJectione Firmæ of two Acres of Medow in Kingham of the demiſe of Anne Keene, upon the 26. day of March, anno 22. Jacobi Regis, for 7. years, from the Purification before the Ejectment. Upon Not Guilty pleaded, a ſpecial Verdict was found, That one Richard Keene was ſeiſed in fee of a Meſſuage, and of two Acres of Land in Chipping Norton, and of the ſaid two Acres of Medow in Kingham, and uſed and occupied the ſaid two Acres of Medow, being four miles diſtant from the ſaid houſe, together with his lands and tenements in Chipping Norton, and held them all in Soeage, and being ſo ſeiſed, upon the 20. day of May anno 30. Elizab. Reginæ, by his Will in writing, deviſed the ſaid houſe, cum omnibus & ſingulis pertinentiis ad inde vel aliquo modo ſpectantibus Thomæ Keene, filio ſuo, & hæredibus ſuis in perpetuum, Et pro defectu hæredum prædicti Thomæ Keene, to Anne Keene daughter of the ſaid Richard Keen, and to her heirs for ever. And for default of the heirs of the ſaid Anne Keene, tunc prædictum meſſuagium cum pertinentiis, Johanni Keene conſanguineo ſuo, & hæredibus ſuis, in perpetuum. And the ſaid Richard Keene by the ſaid Will deviſed, omnes terras ſuas, & omnia bona ſua mobilia & immobilia to Elizabeth his Wife during her viduity, & the ſaid Richard Keene afterwards died, the ſaid Thomas Keene being his Son & Heir; & that the ſaid Elizabeth entred, and was ſeiſed, and that the ſaid Thomas Keene entred into the ſaid two acres of Medow, and diſſeiſed the ſaid Elizabeth; And afterwards upon 12. Decemb. anno 37. Elizabeth. Regin. infeoffed thereof Edward Keene with warranty againſt him and his Heirs, and that Thomas Keene died without iſſue, and that the ſaid Anne, Daughter to the ſaid Richard Keene was his Siſter and Heir; and that afterwards Edward Keene being ſo ſeiſed, deviſed that land to Anne his Wife for her life, and dyed, and that the ſaid Anne Keene entred, and let to the Plaintiff, who entred, and the Defendant ejected him, Et ſi ſuper totam materiam, &c. This Caſe was argued at the Barr; Firſt, whether by this deviſe of Richard Keene of the Meſſuage cum pertinentiis, thoſe two acres of Medow paſſed, being uſed with it; & all the Court conceived they did not paſs, because by the words cum pertinentiis, land paſſeth not, but only ſuch things which properly may be pertaining: Otherwiſe it is, if it had been cum terris pertinentibus, then that which was uſed to it, would have paſſed; but

3 Cr. 114. Benl. 128. Ant. 17. Poſt. 169.

Poſt. 308. 2 Cr. 174. Moor. 222. Pl. Comm. 169. a.

but by the bare words cum pertinentiis, without other circumſtan-
Pl. C. 170. a. ces to declare his intent, they ſhall never paſs Vid, Plowd Hill. and
Granges Caſe, 23. Hen. 8. 6. The ſecond Queſtion was, admitting
they paſs, whether it be an Eſtate tail in Thomas and the Remain-
der in Anne (under whom the Defendant pretends to claim as it
was affirmed) or a Fee-ſimple in Thomas and the Remainder void;
For it was agreed, That if the Remainder had been limited to a
meer Stranger, the firſt eſtate had been a Fee, and the Remainder
void, as it is 19. Hen. 8. & 29. Hen. 8. Dyer 33. becauſe no intent
2 Cr. 391. appears to make an eſtate tail, but a Fee-ſimple, by the words,
and then the Remainder over is void: But here when it is limit-
ed to the Brother and his Heirs, and if he dye without Heir, to his
Siſter, who is his Heir, to whom he intended it ſhould go; Thoſe
2 Cr. 290. 416. words ſhew what Heirs he intended, viz. Heirs of the body;
wherefore by his intent an Eſtate tail was to be created. But in
Vid. 6. Mo. 1515. this point Richardſon, Hutton, and Harvie conceived it to be a Fee,
and not an Eſtate tail, and the Remainder to be void, but Yelver-
ton and my ſelf held the contrary, and that ſuch conſtruction ſhould
be made, as ſhould make it agree with the intention of the party;
Poſt. 146. but they all agreed; there was a collateral warranty deſcended,
which barred the Remainder, and not a warranty commencing
by diſſeiſin, as was objected, Vid. Coke 10 Rep. fol. 95. Seamors
Caſe. But becauſe no title is here found at all for the Defendant,
but *primer poſſeſſion*, the matters in Law cannot come in iſſue; and
therefore, quacunque via data, Judgment ought to be given for the
Plaintiff; And Judgment was given accordingly.

Smith *verſus* Aſhe and his Wife.

2. FOr a Debt due by the Wife before marriage, the Husband was
Hutt. 86. returned out-lawed, and the Wife waived, but before the re-
turn of the Exigent, one Elwiſe an Attorney procured for the Wife
a Superſedeas, ſurmiſing that the ſaid Wife had appeared by him
as her Attorney; And it was now moved by Henden, that this
appearance of the Wife ſhould be received; And all the Court con-
ceived, That if upon the Exigent the Sheriff had returned reddidit
ſe, or upon pluries capias had returned cepi corpus for the Wife, then
her appearance ſhould be entred, but not by Attorney as it is here,
2 Cr. 445. and the Exigent ſhould iſſue only againſt the Husband, Et idem
dies ſhould be given to the Wife. But when the Husband upon the
Exigent is returned outlawed, then it ſhall be entred *Ales ſans jour*
for the Wife, for the Proceſs is determined, and if he will purchaſe
his pardon, he ſhall not have allowance thereupon in a Scire
facias, unleſs he appeared for himſelf and his Wife; but if for the
Husband the Sheriff ſhould return Cepi corpus upon a Pluries ca-
pias, and a non eſt inventa for the Wife; yet an Exigent ſhall iſſue
againſt both, becauſe it is intendable the Husband might bring in
his Wife; but if upon the Exigent the Sheriff returned reddidit ſe

for

for the Husband, and for the Wife, and she is waived, the Husband shall go sine die; But in this case because the Exigent was returned against both, to be outlawed, the Supersedeas, supposing the appearance of the Wife, is meerly idle and void, whereupon it was disallowed, and the Exigent appointed to be filled against both, Vide 40. Ed. 3. fol. 34. 43. Ed. 3. fol. 18, 14. Ed. 3. 1. 3. Hen. 6. fol. 14. 34. Hen. 6. fol. 29. 14. Hen. 6. fol. 14. 10. Elizab. Dyer 271. 11. Hen. 4. 71. & 89. 9. Ed. 4. fol. 23. 18. Ed. 4. fol. 4.

Sir Henry Mildmays Case, in the Exchequer Chamber.

SIR Henry Mildmay as Administrator of Sir Thomas Mildmay, brings Error of a Judgment given against him in debt, upon an obligation, where plenè administravit was pleaded, And now whether it shall be allowed without bayl, upon the Statute of 3. Jacobi cap. 8. because the words of the Statute are general, In every Action, was the question, But because the Plaintiff brings Error only as Administrator, and the Judgment against him was not for his proper debt or case, It was resolved by all the Court, That he is out of the intention of the Statute, although he be within the words, it being against reason he should be put to Mainepriſe, and make that his proper debt, where he brings only the Suit as Administrator; whereupon it was ruled accordingly; That the Writ of Error should be received, and a Supersedeas awarded for the execution, without putting in bayl; and so Wright the Clerk of the Errors said, was the common practice upon that Statute. 3. 2. Cr. 135. 2 Cr. 350.

Sir Charles Howards Case, in the Exchequer Chamber.

UPon conference with all the Justices and Barons in the presence of Sir James Ley Earle of Marleborow Lord Treasurer who commanded them to be assembled: It was resolved in a Case out of the Exchequer Chamber, upon an Information by English bill, against Sir Charles Howard, whereas the King was seised in fee of a Park called Putney-moore-clap, and King James by his Letters-patents under the great Seal, granted officium custodis of the said Park to Sir Charles Howard, habendum to him the said Office cum omnibus Vadiis, Feodis, Windfall-trees, Profits and Commodities thereto belonging in tam amplis modo & forma prout aliquis alius officiarius illud exercens habuit, tenuit, & occupavit, seu gavisus fuit, & etiam pro consideratione prædicta, granted unto him an annual Fee of thirty pounds per annum, issuing out of all his Majesties Manors in that County, habendum to him for life: Afterwards the King which now is, by his Letters-patents under the great Seal, published his pleasure for disparking the said Park, and grants all the Dære therein to Sir Richard Weston Chancellor of the Exchequer, with liberty to take and carry them away, &c. 4. Hutt. 86. Jones 151.

The firſt queſtion was, whether by theſe Letters-patents the King may diſſolve the Park; and if thoſe Letters-patents be a diſſolving of the Park. The ſecond queſtion was, admitting the Park be diſſolved, whether the Office of the Keeper be determined, and if determined, whether Sir Charls Howard may have any remedy for the caſual fees and profits. Thirdly, admitting the Park be diſſolved, and the Office determined, whether the fee of 30l. per annum granted in conſideration of exerciſing the ſaid Office, be alſo determined. It was argued by the Attorney General for the King, and by Mr. Andrews Reader of Lincolns Inne for Sir Charls Howard, and afterwards the Juſtices and Barons gave their reſolutions. For the Firſt they all agreed, That the Park is well diſſolved, and ſhall no more be accounted a Park, all the Deere being deſtroyed, for a Park conſiſteth of Vert and Veniſon and Ecloſure; and if it be determined in any of them, it is a total diſparking; and notwithſtanding the grant of the Office the owner may well diſpark it according to the opinion of Wythers Caſe 6 Ed. 6. Dyer 71. Secondly, they all held, That the Park being diſſolved, the Office dependant thereunto is determined, and the Grantee of the cuſtody thereof hath not any remedy; for it being the will of the Owner of the Park to diſpark it, and to deſtroy the Deere, the cuſtody is then determined, for he cannot be Keeper where there be neither Deere nor Wood, but all deſtroyed. And although it be true, that an Officer who hath the grant of an Office for life, or years, and is to have the profit of caſual Fees, as Steward, Bayliff, or Parkerſhip, (as it is in 31 Hen. 8. grants Broke. 134. & 34 Hen. 8. grants 93. cannot be diſcharged of the Office, for then he ſhould not have his caſual Fees; that is to be underſtood that the Grantor cannot appoint another, where the Park or Manor alwaies continues, as 18 Ed. 4. fol. 9. reſolves: But when the Park it ſelf is determined and diſparked, the Office which is appendant thereunto, ſhall be alſo determined; but ſo long as the Park continues a Park, he may not diſcharge him of the Office, and make another Officer. Becauſe he hath that office for his life, and the profits thereof conſiſt in caſualties, but the office of a Keeper is in reſpect of the keeping of the Park, and his caſual profits are in reſpect of his pains and attendance upon the game, the keeping thereof; and it is to be intended, that at the beginning of that Office, they were only granted in reſpect thereof, and in continuance of time they are become appendant to the Office; and when the Park is deſtroyed, ſo as there needs not ſuch attendance, then ceſſante cauſa ceſſat effectus: As if one grants the Office of Steward with all profits of Courts; if the Manor be deſtroyed, the office, & with it, the caſual profits are determined, alſo: So here the Park & liberty of the Park being determined, the office is determined in it ſelf. The third queſtion (admitting the office to be determined) whether the annual Fee of 40l. being granted in conſideration thereof, iſſuing out of the Kings Mannors in the County of Surrey,

Co. Litt. 233. a.
Hob. 43.
Hob. 41.
C. L. 233. a. b.
2. Cr. 18.
Co. 9. 50. a.
Hob. 41.

Surrey, be alſo determined, and Sir John Walter Chief Baron held clearly it was, but all the other Juſtices and Barons diſſented from him in this point only, becauſe it is granted by a diſtinct clauſe, and not out of the Park; and although the office be determined, yet becauſe it is not by the act or default of the Grantée himſelf, but by the act of the Grantor only, they conceived the Grantée ſhould enjoy that annuity, Vid. 5 Ed. 4. fol. 8. 7. Ed. 4. 22. Plow 457. Sir Thomas Wroths Caſe & 381. Sir Henry Nevils Caſe. Ant. 49. p. 280. 2 Cr. 18. Co. Litt. 233. b

Sir Gregory Fenner *verſus* Nicholſon and Paſfeild, Hill. 22. Jacobi Rot. 239.

SIR Gregory Fenner brings a Quare Impedit againſt Nicholſon and Paſfeild, and the Biſhop of London, as Ordinary for the Church of Chelmsford, and ſhews that Sir Thomas Mildmay was ſeized, and preſented Paſfeild, and let the Manor, to which the Advowſon is appendant, to the Plaintiff; And that the Church became void by the reſignation of Paſfeild, by reaſon whereof it belonged to him to Preſent; The Biſhop pleaded nothing but as Ordinary, Paſfeild entitles himſelf unto it, by preſentation, as to an Advouſon in groſs, and traverſeth the appendency; whereupon the Plaintiff taketh iſſue; The Defendant Nicholſon pleaded as Parſon Imparſonæ of the Preſentation of the King; and confeſſing the title of Sir Thomas Mildmay, and the Leaſe for years of the Manor made to Sir Gregory Fenner, pleads over, That the ſaid Sir Thomas Mildmay pro quadam pecuniæ ſumma, betwixt him and one John Joſſelin, preſented the ſaid Paſfeild, and pleaded the Statute of anno 31. Regin. Eliz. cap. 9. which makes a Preſentation upon Symony, and the Inſtitution and Induction thereupon to be void, and that the King ſhould have the title to Preſent. So by reaſon of this Preſentation, made by Symony, it is void and belonged to the King to Preſent; who Preſented the Defendant Nicholſon, who was Admitted, Inſtituted and Inducted; and traverſeth, That the Church became void by the reſignation of Paſfeild, pro ut, &c. And thereupon it was demurred and ſhewn for cauſe, That the Travers was inſufficiennt to Traverſe matter not Traverſable, and that this plea is double. It was argued at the Bar by Henden, That this Travers is ill, becauſe the Preſentment is the principal, which being confeſſed and avoided, cannot be traverſed: For the avoiding and traverſing make it double, and that being ſpecially ſhewn for cauſe of Demurrer, and the other joyning in the Demurrer, judgment ought to be for the Plaintiff. Alſo the pleading of the Simony, That pro quadam pecuniæ ſumma. It was agreed, &c. And not ſhewing for what ſum, is uncertain and ill. But all the Court conceived, That the Plea was good; For the Plea maketh the Travers but argumentative that he might not reſign, And being alledged that the Church is void, per mortem vel reſignationem, or otherwiſe, it ought to be Confeſſed or Traverſed; 5. Poſt. 354. Poſt. 105. Poſt. 105.

Traversed; For that is the cause of his Presentment, and the issue ought to have been taken Si vacavit per mortem, vel deprivationem vel resignationem; For the Presentation, Admission & Institution are but conducing to the resignation, and the resignation or avoidance is the chiefest matter. Vide 23 Eliz. Regin. Dyer 376. Coke lib. Entran. fol. 499. Sayes Case. Such issue, Si vacavit per mortem, and Hillary 15 Jacobi, Rot. 2091. Paschalls Case. In Quare Impedit, Simony was alledged and Presentment by the King by reason thereof, &c. and traverseth the vacancy per mortem. Mich. secundo Caroli Reg. Presentment for Simony was alledged to be made and concluded with a Travers of the vacancy per mortem. So are the presidents, That the issue may be entred upon the avoidance, viz. If it be pleaded per mortem, deprivationem, vel resignationem, as the principal matter traversable, according to the presidents in the book of Entries, 485 490, 511. whereupon judgement by consent was resolved to be given for the Plaintiff, against Pasfeild, he relinquishing his Plea, and confessing the Action, and upon the Demurrer Judgment should be given for the Defendant, and so it was, and release of Errors on both sides.

Fotherbies Case.

6. Hutt. 48.

PRohibition by Fotherby Administrator of Fotherby, for suing in the Ecclesiastical Court, against him as Administrator, to make distribution of some part of the personal estate, to the sister and heir of the intestate, surmising that by the Law of the Land, The Administration being committed to the intestates wife, The Ordinary hath no authority to intermeddle with making distribution of the goods of the Intestate, to the children or kindred; It was strongly urged by Serjeant Henden, and Serjeant Finch, That such Prohibition is not allowable: For when one dies intestate, the usual course hath been, for the Ordinary, after all debts paid, to give order for the distribution of one part of the goods to the wife and another part to the children; and if he hath not any children, then to his kindred. But Hutton said, It is not reasonable, nor stands with Law, That the Ordinary should assume such a power, For by the Statute of 31 Ed. 3. cap. 11. the Ordinary is Co. 9. f. 39. b. compellable to commit Administration, And the Administrator is only chargeable, and the Ordinary hath no more to meddle with it, and it would be mischievous if the Ordinary should compel him to make distribution; for peradventure he may be chargeable with Actions of debts unkown, after good accompt; Also the Administrator by the Administration of the goods committed unto him, Post. 202. hath an absolute interest in them, with which the Ordinary hath not Hob. 83. to meddle; And although, at the Civil Law, the Administrator was accountable, as servant to the Ordinary, and might be discharged by him, and a Repeal might have been of the Letters of Co. 9. 39. b. Administration at the Ordinaries pleasure; yet at this day, especially,

ally after the Statute of 21. Hen. 8. The Administration being duly committed by the Ordinary, cannot now be repealed, & if there be a suit to have it repealed, a Prohibition lies, And divers Prohibitions in such cases have been granted; And as to the Case in question he said, he knew when he was at the Barr, and since he came to the Bench, That divers Prohibitions had been granted, where the Administrator was sued to make distribution; As in Clerks Case, and Mich. 20. Jac. Reg. Rot. 2196. For Jane Swyft Administratrixt of Hugh Swyft, she being bound in an obligation of 200l. to the Ordinary, to mak true Administration, exhibit a true Inventory, make a perfect accompt, and to distribute the Surplusage after all debts and legacies paid, at the appointment of the Ordinary; and being sued before Doctor Seaman, Commissary to the Bishop of Glocester, to make distribution, moved for a prohibition, which was granted upon good advise, by award of the Court. So hereupon a prohibition was likewise granted In Trin. 14. Jac. Reg. It was resolved by Hobert, Warberton, Winch and Hutton in the Case of Tucker, That a prohibition should be granted to the Delegates in an appeal of such Sentence from the Ordinary, for adjudging to make distribution, and Mich. 20. Jac. Rot. 2196. & Hill. 9 Jac. Rot. 1608. for Watts. See after Levannes case, Term. Mich. 6. Car. pag. 201

R. 37. 141. Post. 202.

Hetl. 68.

Post. 202.

Hob. 191.

Sydley *versus* Doctor Mundford, in the Exchequer Chamber

ERror in the Exchequer Chamber of a Judgment in the Kings Bench. The Error assigned was for that Doctor Mundford brought Tresp. for three loads of Oats taken at Tewing 20. Septembris anno vicessimo Jacobi Regis, the Defendant justifies; because the place where, &c. is parcel of a Copyhold in Tewing, and makes title to it, and justifies for *damage fesant*: The Plaintiff shews, that long before the time when, Et prædicto tempore quo, &c. he was Parson of Tewing, and that the place where, is within his Rectory, and the tythable places thereof; And that the Defendant being a Copyholder there, the 20 Septemb. anno 20. Jacob. Reg. let it to one Hawkes, to have it from year to year, quamdiu ambabus partibus placeret; And that Hawkes entred, and plowed, sowed, took the crop, and set out the said Oates for his Tythes, and the Defendant de injuria sua propria, took the Oates prædicto tempore quo, &c. The Defendant maintaining his barr, traverseth the Lease, and it was found for the Plaintiff, and Judgment for him; and now Error assigned, for that he alledged he was Parson tempore quo &c. and at the time of the tresp. supposed, ac diu antea, but doth not say, that at the time of the severance of the Corn he was Parson, for it shall not be intended without shewing it, but rather that he was Parson at the time of the Tresp. and not at the time of the severance, and then he makes not a sufficient title unto them; But all the Justices and Barons conceived it was well enough, and shall be intended by all the circumstances, that he

7. 3 Bul. 336.

Ante 6. Post. 265.

was

was Parſon at the time of the Severance; for it is ſaid, antea & tempore quo fuit Parſon, & adhuc eſt, &c. and eſpecially the Defendant having admitted that he was Parſon, and the ſaid Tythes due unto him, and making travers to the Leaſe, which was an idle travers, and therefore good cauſe of demurrer, and the Replication is good; for being pleaded that diu antea & tempore quo, &c. he was Parſon, it is certainly enough intended, he was Parſon at the time of the Severance, as well as at the time of the taking, whereupon Judgment was affirmed, notwithſtanding the book 35. Hen. 6. fol. 48. which was much inſiſted upon.

Poſt. 20. 2 Cr. 67.

The Earl of Lincolns Caſe, in the Star-Chamber.

8. Hutt. 87. Jones 152. 154

Memorandum, That upon the 13. *day of February anno* 1626. in the Court of Star-Chamber, all the Juſtices of both Benches being there (beſides Juſtice *Dodgridge*) and all the Barons of the Exchequer, and a very great aſſembly of the Lords, *viz*, *The Lord Keeper*, *Lord Treaſurer*, *Lord Preſident of the Council*, *the Duke of Buckingham*, *the Earl of Pembrook*, *Lord Steward*, *the Earl of Suffolk*, *Earl of Carlile*, *Earl of Holland*, *the Lord Chancellor of Scotland*, *the Lord Conwey Principal Secretary*, *the Lord Carlton*; & divers others others of the privy Council; It was moved, whereas *Sir Henry Fines* Knight, had exhibited his bill in the Star-Chamber againſt the *Earl of Lincoln*, for divers Riots & other Miſdemeanors, & the *Earl of Lincoln* had taken a Commiſſion forth, to put in his anſwer upon oath in the Country, & he offered before them his anſwer upon his honour, but would not put it in upon oath, becauſe he was a Peer of the Realm; which matter being now reported by the Commiſſioners, It was now moved by the Kings Solicitor, to have the reſolution of the Court: And it was held by all the Juſtices, who delivered their opinions *ſeriatim*, That the Lords in Caſes criminal eſpecially where the King is party) ought to put in their anſwer upon oath; & in all caſes where they are to be Witneſſes between party and party, they ought to be ſworn; and the Lord Keeper ſaid, *Quod in Judicio non creditur niſi juratis*, & that he had cauſed preſidents to be ſearched, & had found divers ſince the firſt of Queen *Eliz.* wherein Peers of the Realm being impleaded in Chancery, or Star-chamber, or Court of Wards; have been always ſworn: And he ſaid when a Peer affirms any thing which is not true upon his honour, there is not any remedy, but if he affirms that which is falſe upon his oath, there is remedy, by the Statute of 5. *Eliz. cap.* 9. *againſt perjury*, wherefore they all reſolved that the *Earl of Lincoln* ought to be ſworn; & of the ſame opinion were all the Lords and Counſellors, which they delivered *ſeriatim*, *nullo contradicente*, becauſe it is *Juramentum purgationis*; & not *promiſſionis*; & Princes are ſworn to all their leagues & confederacies, which is called *Juramentum confirmationis*, neither is it any diminution to the ſaid Earls honour, to be ſworn about that, which he would not ſhould be put upon his honour.

Suttons

Suttons Case.

SUtton Chancellor of the Bishop of Gloceſter, moved for a Prohibition, to ſtay a Suit before the Commiſſioners Eccleſiaſtical, for that Articles were there exhibited againſt him, becauſe he being a Divine, and having a Rectory with cure of Souls, and never brought up in the ſcience of the Civil or Cannon Laws, and not having any intelligence in them, took upon him the office of the Chancellor of the Biſhop of Gloceſter, whereas there were divers canons and Eccleſiaſtical conſtitutions, and alſo directions from the late King James, and from the King that now is, That none ſhould be admitted to have thoſe offices of Chancellorſhip to a Biſhop, unleſs he were inſtructed and learned in the Cannon and Civil Laws, becauſe divers Cauſes tryable in the ſaid Courts, are of weight, and the Judges there ought to have knowledge of the Laws, otherwiſe they cannot adminiſter right to the Kings Subjects. Upon theſe Articles, Mr. Sutton being examined, confeſſed that he was a Divine, and had a ſpiritual living, and that the office of the Chancellorſhip of the Biſhop is grantable for life, and that ſuch a Biſhop of Gloceſter had granted to him the office for his life, which the Dean and Chapter had confirmed, whereby he had a Freehold therein, and ought to enjoy it during his life; and that notwithſtanding this anſwer they intended to proceed againſt him, wherefore he prayed to have Prohibition, but the Court denyed it; for if he be a perſon unskilful in thoſe Laws, and by Law ought not to enjoy it, they may peradventure examine that; for although a Lay-perſon, by his admiſſion and inſtitution to a Benefice, hath a Freehold, yet he may be ſued in the ſpiritual Court, and deprived for that cauſe; but if he hath wrong, he may peradventure by Aſſiſe try it; therefore a Prohibition was denyed.

2 Ro. 286. 9. Lat 228. Noy 91. Godb. 390. Anr. 56. Jones. 393.

Memorandum, That in this Term Sir *Nicholas Hide* of the middle-Temple was made the Kings Serjeant, and by ſpecial commiſſion directed to Sir *James Ley* Lord Treaſurer of *England* (becauſe the Lord Keeper was ſick) being made by Writ Chief-Juſtice of the Kings-Bench, he was there ſworn in the place of Sir *Randolph Crew*, who was the laſt Term diſcharged of his place.

Poſt. 10. 225. Anr. 52. Poſt. 375.

Termino Paſchæ, anno tertio *Caroli* Regis,

in Communi Banco.

THE firſt day of this Term two new Serjeants were made, *viz.* Sir *Robert Berkly* of the middle Temple, & *RowleyWard* of the ſame Houſe; they had their Writs in the Vacation, returnable *Quindena Paſchæ*, & appeared in Chancery the *firſt day of this Term*, & upon the *Thurſday ſevenight following*, all the Juſtices and Barons being aſſembled at *Serjeants-Inne* in *Fleetſtreet*, The new Serjeants came in their party-coloured Robes, with the Marſhall and Warden of the Fleet before them, and ſo preſented themſelves before the Juſtices, and becauſe it was againſt courſe (for they ought to have come in their Robes of brown-blue, *alias* black-coloured) they were ſent back again; alſo they came into the ſaid Hall, each of them having his Servant, bearing his ſcarlet Hood, his Quoife, and Cap before him; but that alſo being againſt courſe, (for every Servant ought immediately to follow, & not precede his Serjeant) they were directed to go back again, and return in their Gowns of brown-blue, and then (without any ſpeech made unto them by the chief-Juſtice, as the uſuall manner is) they recited their Counts, and had their Writs read; they directed their ſpeech to the chief-Juſtice of the Common Bench, & then went & kneeled down before the two chief-Juſtices, who putting on their Quoifes and ſcarlet Hoods, they then returned to their Chambers, & from thence went in their party coloured Robes unto *Weſtminſter*, and were each of them preſented at the Common Bench by two ancient Serjeants, and gave Rings with this inſcription, *Lege Deus & Rex*, and they made their feaſts at *Serjeants-Inne* in *Fleetſtret*, at which the Lord Treaſurer, the Earl of *Mancheſter*, Preſident of the Council, and all the Juſtices, Barons, Serjeants, the Kings Council, and Prothonotaries were preſent, and none others; and the ſaid Sir *Robert Berkley* was the ſame Term ſworn the Kings Serjeant at Law. 1. Poſt. 71. Poſt. fol. 85.

The Lord Morley and the Biſhop of Chicheſters Caſe. in the Star-chamber.

IN this Term all the Juſtices were aſſembled at *Serjeants-Inne*, upon a Caſe referred out of the Star-chamber, betwixt the *Lord* 2.

Morley and the *Biſhop of Chicheſter*, which was. The *Lord Morley* and *Sir Richard Molineux* exhibited a bill in the Star-chamber, *in Michalm. Term anno 19. Jacobi Regis* againſt the *Biſhop of Chicheſter* & *James Hutchingſon*, which was ſcandalous, and a Libell againſt the Biſhop: *In anno* 21. *Jacobi* came the general Pardon, wherein all offences (not Treaſon) were pardoned; afterwards *in anno* 22 *Jacobi* there was a motion in the ſaid Court for the Biſhop, that the bill againſt him being ſcandalous might be taken off the file, whereupon it was ordered accordingly, unleſs cauſe were ſhewn before ſuch a day; when no cauſe being ſhewn, it was ordered to be taken off the file, and the Plaintiff to be fined 100l. to the King, and 100l. damages were given to the Biſhop. And now the Plaintiff prayed to have benefit of the Pardon, and to be diſcharged of coſts to the Party, and thereupon cited the caſe betwixt *Beverly* and *Poyer in primo Jacobi Reg.* where, upon ſuch bill, fine being given to the King againſt the one Defendant, and the other diſmiſſed, and fine againſt the Plaintiff, & damages of 500 marks aſſeſſed to the Defendant againſt the Plaintiff, becauſe the Bill was ſcandalous & a Libell as againſt him; although the Bill was before the general Pardon, & the Sentence after, yet it was reſolved by adviſe of all the Juſtices, That the Pardon ſhall relate and diſcharge the Plaintiffs offence, & that the Sentence againſt him, for the fine and coſts was taken away, becauſe it was not a Bill depending, *quoad* the ſaid Defendant againſt the Plaintiff, but *quoad* the other Defendant, the Sentence was good being for an offence, whereof the Bill is depending, which is excepted within the Pardon; therefore the fine was well aſſeſſed as to him, but *quoad* the fine againſt the Plaintiff, the Pardon takes hold and remitteth it: So here it was reſolved, That the fine and coſts are diſcharged by reaſon of the Pardon, and that there is not any difference betwixt this & *Beverlyes Caſe*, although that day was here given to ſhew cauſe, for he hath not any means to plead the Pardon; wherefore they all reſolved, that this general Pardon intervening betwixt the Bill and the Sentence for the Fine and Coſts, the Plaintiff ought to be diſcharged of the ſaid Fine and Coſts, by reaſon thereof.

Hutt. 79.

2 Cr. 335.

Ante. 47.

Co. 5. 51. b.

Langham *verſus le Feme* de John Bewett

3. Heil. 9

UPon an Habeas Corpus to London, to remove the body cum cauſa of the Wife of Bewett, it was returned, That an Action of debt was brought againſt her, and her Husband in London, as a *feme ſole Merchant* for wares bought by the ſaid Wife, wherein the Husband is only named for conformity, and by the cuſtome, the Execution ſhould be only againſt her: Upon this returned before the Lord Richarſon, he took bayle de bene eſſe, becauſe it was affirmed that the *Feme* merchandized only for her Husband in buying wines (her Husband being a Vintner) in which Caſe, it ſeemeth, ſhe is out of the Cuſtome, and ſo ought not to be charged; and it was moved to have the direction of the Court, what ſhould be done, for

for the *Feme* continued in prison; and the Custome of London was read, That a *Feme sole Merchant* is where the *Feme* trades by her self in one Trade, with which her Husband doth not meddle, and buys and sels in that Trade; there the *Feme* shall be sued, and the Husband named only for conformity, and if Judgment be given against him, Execution shall be only against the *Feme*; and Richardson and Yelverton conceived, That she should be discharged; for when it appears by examination, That she used the Trade which her Husband used, she in Law is but Servant to her Husband, and the wares coming to his use, he by intendment is to be sued; and this Case is out of the Custome, for it seemeth this Custome intendeth only where the *Feme* useth one Trade, and the Husband another and doth not meddle with his Wives Trade, nor the Wife with the Husbands, but when she deals in her Husbands Trade, and in none other, it shall be accompted her Husbands Trade, and then the Husband ought to be sued, and not the Wife; but Hutton Harvie, and my self were of another opinion; for as much as the Writ had returned, That she was sued in London as a *Feme sole Merchant*, according to the Custome of London, and therefore this is such an Action and Cause, wherewith this Court ought not to meddle, nor take conusance, nor can give the party relief, although he hath good cause of Suit; for in London they are Judges of their own Customes, and by intendment will proceed in their Courts there according to their Customes, and not otherwise; and therefore we ought not to take away their priviledges, nor remove the Action out of that Court, where we cannot give remedy in this; And it is a forain surmise, That it appears not in the return, the *Feme* used the same Trade her Husband used, also they conceived, although she used the same Trade that her Husband at any time used, as in this Case is pretended, yet because at that time of the contract, (as was affirmed) the Husband did not meddle with the trade, but she only used it; and the Husband was then in the Kings service, beyond Seas, as a Souldier; and although he now returned bare and needy, yet did he not meddle with the trade, (as was affirmed by oath;) and these contracts were made in his absence, (as was likewise testified by oath.) It is no reason to accept bayle, where an Action cannot be grounded upon that contract in this Court. But to remand the cause, according to the Books of 1. Edw. 4. 6. 35. Hen. 6. 28. 9. Edw. 4. 35. 21. Hen. 7. 18. But afterwards it was agreed and compounded, and nothing done. Vid. Mich. 29. Hen. 6. Rot. 344 betwixt Geppings and Harding. This Case pleaded, and issue taken, whether she were a *Feme sole Merchant* in Trespass for goods taken by her delivery, and found for the Plaintiff, That she was not a *Feme sole Merchant*: So that every *Feme sole* which traveth in London, is not a *Merchant*. Iudg. Ref. 89.

March

March *verſus* Culpepper and Anne his Wife
Hillary 2. Caroli Rot.

4. Hetl. 1, 8. 11. ASſumpſit whereas on Hugh Goddard was indebted to the Plaintiff in an hundred and ſeven pounds, for wares ſold unto him by the Plaintiff, and dyed intestate; The ſaid 107 l. being due, and not paid, and adminiſtration committed to the Wife of the Defendant, for which 107 l. the Plaintiff intended to ſue the ſaid Wife as Adminiſtrator, but the Husband of the ſaid Anne, dum ſola fuit, deſiring to know the true debt which the ſaid Hugh her former Husband, at the time of his death owed unto the Plaintiff, the 30. day of July anno primo Caroli Regis, requited the Plaintiff, Quod quidem Willihelmus Whiteman, Egidius Diggs & Hugo Owen ſuperviderent compotum, betwixt the Plaintiff and the Inteſtate of and concering the ſaid wares ſold, &c. ut ſuam certitudinem cognoſceret, whereto the Plaintiff aſſented, & then they finding ſuper viſum compoti, That the ſaid Hugh, the Inteſtate, at the time of his death, was indebted to the Plaintiff in the ſaid ſumm of 107 l. gave notice thereof to the Defendant Anne the ſame day, &c. and the ſaid Anne knowing that the Inteſtate at the time of his death was indebted to the Plaintiff in the ſaid ſumm; the ſaid Anne, dum ſola fuit, in conſideration of the premiſes, ad tunc & ibidem, ſcilicet, the ſaid thirtieth day of July anno primo Caroli Regis, promiſed the Plaintiff to pay unto him the ſaid 107 l. in this manner (viz) part thereof, before the end of Michaelmas Term then next enſuing, and the reſidue within reaſonable time after, and alledges in facto, That the ſaid Michaelmas Term began at Reading, and ended ſuch a day, and that neither the ſaid Anne dum ſola fuit, nor the Husband and Wife, during the Coverture, had paid the ſaid 107 l. or any part thereof, whereupon the Defendant pleaded to iſſue, and it was found for the Plaintiff, and alledged in arreſt of Judgment, That here is not any ſufficient conſideration ſhewn to ground the Action; for there is not any matter of profit or advantage to the Defendant, nor any matter of charge or trouble to the Plaintiff, and without one of them, there is not any conſideration to charge the Defendant, and to make him lyable to pay it out of his own proper goods, for the promiſe of the Wife, dum ſola fuit ſhall not tye him without valuable conſideration: But the Lord Richardſon, Hutton, Harvie, and Yelverton conceived, he did a thing at her requeſt which he needed not, viz. ſhew his accompts to her three friends, appointed by her, which is a trouble unto him, and more than he needed to have done. And it ſeemeth the conſideration is ſufficient, and the breach of promiſe made thereupon, juſt cauſe of ſuit, eſpecially the promiſing to pay at two dayes, which implyes that in the Interim the Plaintiff ſhould forbear his Suit, which being found by Verdict,

Poſt. 77. 160. 273. 409.

dict, is a good consideration; And thereupon the Plaintiff had Judgment.

AFter the end of this Term, two other new Serjeants were made, viz. *Aliff* of *Lincolns Inne* and *Robert Callice* of *Grays Inne*; their Writs were returnable, *tres septimanas Paschæ*, & they appeared in Chancery *quarto die post* the same return, & kept their Feasts at *Serjeants Inne* in *Fleetstreet*, and observed the same form in their presentation as was before, and gave Rings *quorum Inscriptio fuit, Regis Oracula Leges.* 5. Ante 67.

The Soldiers Case.

MEmorandum this Case by his Majesties command was propounded to all the Judges, to be by them resolved; Whereas one had received press-money, to serve the King in his wars, was enrolled, taken pay, and delivered amongst the other Soldiers to a Conductor, to be brought to the Sea-side, and did afterward withdraw himself, and run away without licence; whether this departure be felony, &c. Upon conference and debate hereof, it was conceived by *Hutton, Yelverton, and my self*, That it was not felony, either by the Statutes of 7. *Hen.* 7. *cap.* 1. or by 3. *Hen.* 8 *cap.* 1. which are the sole material Statutes to this point, as it is resolved *Coke* 6. *Rep, in the Case of Soldiers* 27, That those Statutes mention only departure from their Captain, who is a special named person, & of special note and place, and the Soldier who departs, ought to be delivered unto him as his Captain, and he ought to be a Captain in war; and a Conductor is such a person only, who is hired to guide them in the way, or part of the way to their Captain; and such Conductors are new Officers; for in ancient time Soldiers were taken and pressed by the Captains, themselves, therefore this not being a departure from his Captain, is not felony. But it was resolved by *Hide* and *Richardson* chief-Justices, *Walter* chief-Baron, *Doderidg*, *Harvie*, *Jones*, and *Whitlock* Justices, and *Denham* and *Trevor* Barons of the Exchequer. That such departue without licence from his Conductor, was felony; for they held that a Conductor is a Captain within the Intention and meaning of the Statutes of 7 *Hen* 7. & 3. *Hen.* 8. which Statutes although they be pœnal, yet being made for the publick Service, and good of the King and Realm, may very well be taken liberally, according to the intent of the Makers; for a Captain is but a Conductor, Leader, a Chiefstain, and so is a Conductor, for he is one to command and lead them the way they be to go, and the Statute of 7. *Hen.* 7. doth not speak of Captains, but of Lieutenants, which in common acceptation is some what more than a Cptain, and yet no doubt but a Captain is within the said Statute, 6. Hutt. 134. Co. 6. 27. a. Co. Litt. 71. a. 3 Inst. 86.

Statute, and by the ſame reaſon, a Conductor who is ſomewhat leſs than a Captain, may be a Captain, within the Statute of 3. *Hen.* 8. which ſpeaks of Captains and petty Captains, and a Conductor is a petit Captain; *Conductor, dicitur a conducendo*, which is to hire or preſs, or to guide, direct, or go along together in the way, and *Conductores Militum* are Preſſers of Soldiers, therefore a Conductor is a Captain, within theſe Statutes, and a departure from him without licence is felony. Another point was moved how this felony, and before whom it ſhould be tryed, becauſe it is a new Law, which makes a new felony, & it appoints that it ought to be tryed before the Juſtices of peace at their Seſsions, whereupon a doubt aroſe whether Juſtices of Aſsiſe, & Juſtices of *Oyer* and *Terminer* may by their Commiſſion try it or not; and herein was not any reſolution given, but the greater opinion was, That the Juſtices of *Oyer* and *Terminer* may try it by their Commiſſion.

3 Inſt. 86. 87.

Termino

Termino Trinitatis, anno tertio *Caroli* Regis, in Communi Banco.

Wilcocks *verſus* Bradell.

PRohibition, by Wilcocks againſt Jane Bradell the Wife of John Bradell, Principal of St. Mary Hall in Oxford, and Chriſtian the Daughter of the ſaid John Bradell, to ſtay their Suits in the Vice-Chancellors Court of Oxford; for that whereas Jane Bradell had libelled againſt him in the Vice-Chancellors Court of Oxford; for calling her Bawd and old Bawd (which is termed the Action of Injury, and Chriſtian, for theſe words ſcurvy Whore and Jade, and that he did ſtrike her: For ſtaying of theſe Suits, Sentence being given againſt him in both, Wilcocks prays to have ſeveral Prohibitions; And now the Agent for the Univerſity, moved for a conſultation and ſhewed the Charters of the Univerſity anno 14. Regis. Rich. 2. & anno 14. Reg. Hen. 8. whereby is granted unto them, That they may inquire of all Treſpaſſes, Injuries, and of all Pleas and Quarrels, and of all other Crimes and matters (except Pleas of Franktenement) where a Scholar or their Servants or Miniſters ſunt una partium, & cognitionem, & correctionem inde habend. ſecundum eorum Statuta, vel conſuetudines, vel ſecundum legem Regni noſtri Angliæ ad voluntatem Cancellarii; Ita quod Juſticiarii de Banco Regis ſive de Communi Banco, vel Juſticiarii de Aſſiſis non ſe intromittant. Et ſi iidem Juſticiarii inquirere, ſeu aliqualiter cognoſcere, ſeu intromittere perſtrinxerint; tunc ſuper certificationem, notificationem, ſeu ſignificationem Cancellarii Univerſitatis, ſeu ejus Commiſſarii Inquiſitionem, ſeu cognitionem hujuſmodi ſuperſedeant, nec partes ad reſpondendum coram eis ponant, ſed pars illa coram Cancellario, ſeu Commiſſario ſuo ſolummodo caſtigatur & puniatur in forma prædicta; And that theſe Charters were confirmed by Act of Parliament anno 13. Reginæ Elizab. (and ſo were recited verbatim in the Act) And becauſe Wilcocks was a Scholar, and Maſter of Arts of the ſaid Univerſity, it was prayed that the cauſe might be remanded; and it was much debated at the Barr and Bench for that the Parties Plaintiffs were women, which were not any perſons privileged there, and the Defendant who is the Scholar doth not deſire that privilege, but would oppoſe it, and prayeth theſe Prohibitions; but the Court agreed, for as much as the Charters are, That the Univerſity ſhall have conuſance of thoſe Pleas,

1. Het. 25. Poſt. 87. 4 Inſt. 227.

where una pars eſt Scholaris: and ſo the Plaintiffs being thereby inforced to ſue there, therefore the Cauſe ſhould be remanded.

Jeromes Caſe.

8. MEmorandum this Term, becauſe one *Jerome* an Attorny had proſecuted three ſeveral Actions of debt, every of them being above the ſumm of *forty pounds* and ſo finable to the King; and procured Judgments to be entred upon them, no original Writs being ſued forth, he himſelf having received the charges for ſuing the Originals, as well for the Fine to the King, as for the ſaid Writs (as he himſelf confeſſed upon his examination:) And becauſe it was done voluntarily, in deceipt of the King for his Fines, and againſt his Oath as Attorny, That he ſhould not practiſe any deceit, it was ordered; That he ſhould be put out of the Roll of Attorneys, & be caſt over the Barr and committed to the Fleet, but no Fine was impoſed upon him, *quia pauper, vide* 20. *Hen.* 6. *fol.* 37. where is the like Judgment; and it was forthwith put in execution accordingly, and a Preſident was ſhewn, which was entred in the Roll *anno* 30. *Eliz. ib.* That one *Osbaſton* an Attorny, for falſifying and forging a Writ of *Capias*, was ordered to be put out of the Roll, & caſt over the Barr, and fined five pounds, and ſworn never to practiſe after as Attorny, & to be brought to the Kings Bench Barr and Exchequer, that knowledge might be taken of him, That he was not to practiſe any longer as Attorney in thoſe Courts.

Turner *verſus* Palmer.

3. QUar impedit ad preſentandum ad Eccleſiam de Watton, and before appearance of the Defendant, it was moved, That the Writ might be amended; for his title of preſentation is to the Vicaridge of the ſaid Church, and not to the Parſonage; and becauſe it was in a Writ original and in point of ſubſtance, the Court much doubted whether it ſhould be amended; for it is cléer the Writ was miſtaken, for the words ad preſentandum ad Eccleſiam ſalwayes intend right of Advowſon of the Parſonage, but when the title is to the Vicaridge only, there is a ſpecial Writ ad preſentandum ad Vicariam, Fitsherbt. Nat. Brev. fol. 32. & 15. Eliz. Dy. 323. But becauſe Gay the Attorny gave a note to the Curſitor of the Chancery to draw a Writ ad preſentandum ad Vicariam Eccleſiæ de Watton, and becauſe it is a peremptory Action in a Quare impedit, the ſix Months being paſſed; the party being a Purchaſor of the Advowſon, and that miſpriſion happening by the fault of the Clerk, who did not purſue his Maſters direction, it was ordered that it ſhould be amended, and the Curſitor being preſent in Court, was appointed to amend it.

Whiteacres

Whitacres *verſus* Hamkinſon, Hillary, 2 Caroli Rot.

DEbt upon an obligation with condition to pay 100 l. The Defendant pleads, That one John Woodcock was bound with him joyntly and ſeverally in the ſaid Bond, and that the Plaintiff recovered againſt him, and had him in execution upon a Capias ad ſatisfaciendum, and that ſuch a Sheriff libere & voluntarie permitted him to go at large, Et hoc, &c. It was hereupon demurred, and being moved without argument, adjudged for the Plaintiff; for an Execution againſt one is no Barr, but that he may ſue the other; For execution without ſatisfaction is not any Barr; and although he eſcaped by the voluntary permiſſion of the Sheriff, as is pleaded, ſo as the Plaintiff is entitled to an Action againſt the Sheriff, yet that ſhall not deprive him of his remedy againſt the other Obligor; but if he had pleaded, that the Sheriff ſuffered him to go at large by the licence or command of the Plaintiff, it had been a diſcharge and might have been pleaded in Barr. 4. 3 Cr. 850. 2 Cr. 143. 338. Hob. 60. Poſt. 106. 240. 255. 3 Cr. 478. Poſt. 153.

Thorowgood and Jaques *verſus* Collins.

TReſpas. Upon Demurrer the Caſe was, that one Dobſon deviſed the Land in queſtion to the two Plaintiffs, and to four other perſons, habend. to them, their Heirs and Aſſignes in perpetuum, & quod eorum omnes haberent æqualem & conſimilem partem, Anglice, part and part-like, and every of them to have as much as the other; and whether this were a Joyntenancy or Tenancy in common was the queſtion; for the Defendant claimed by deviſe under one of the Deviſees, and without argument it was adjudged, That by reaſon of theſe words, part and part-like, and being deviſed to them, their Heirs and Aſſigns, and being in a Will, it was a Tenancy in common, and not a Joyntenancy, and that the Defendant had good title; wherefore it was adjudged for the Defendant. 5. Het. 29. 2 Cr. 259. Dier. 25. a. 3 Cr. 969. Co. 3. 39. b.

Eve *verſus* Wright, Hillary, 1 Car. Rot. 732.

REplevin. The Defendant made conuſance as Bayliff to the Lord Peters, becauſe the Lord Peters was ſeiſed in fee of the Manor of Writtle, and he and all thoſe whoſe Eſtate, &c. have had within the ſaid Manor a Leete of all the Reſiants in Writtle ſemel in anno, viz. upon the Monday next after the Feaſt of Pentecoſt tenendum, and all Amercements in that Leete, for not coming, and that the Plaintiff was amerced, and for the ſaid Amercement the diſtreſs was taken, and iſſue being joyned upon this preſcription, the Jury at the Barr found this ſpecial Verdict, viz. That the Lord Peters, and all they whoſe Eſtates, &c. have had a 6. Hetl. 21.

Lèct, &c. verbatim ut supra; But further they find, That the Warden and Scholars of New-Colledge in Oxford are seised in fee of the Manor of the Rectory of Writtle, called Romans-fee in Writtle; and that they and all those whose, &c, have had a view of Frank-pledge of all the Inhabitants and Resiants within the said Manor called Romans-fee, semel in anno, in Festo commemorationis Pauli tenendum secundum antiquam consuetudinem ibidem, as to their Manor of Romans belonging; And that the Plaintiff was a Resiant within the said Manor; and if super totam materiam, &c. So the point intended was, Because the Plaintiff was a Resiant within the Lèt of the Colledge, whether he may be said a Resiant within another Lèt, and so chargeable to two Lèts? and whether one may have a grand Lèt of all the Inhabitants within a Vill, and another may have an inferiour Lèt of some of the Inhabitants within the same Vill, so as they shall be subject to two Lèts was the Question? But all the Court held, That forasmuch as the Verdict had found the Issue verbatim, to be precisely for the Avowant, as he pleaded. The finding of the other matter after, is not material, but idle, and Judgment to be given for the Avowant. So the matter in Law was never debated by the Justices, Vid. 13. Ed. 3. Leet 7, 21. Ed. 3, 3, 18. Hen. 6. 12. book of Entries 506. Mich. 18. Jacobi in the Kings Bench, betwixt Cook and Stubbs.

2 Cr. 551. 584.
Hob. 53.
Co. Litt. 227. a.
Post. 130. 212.
Hob. 54.

Chapman *versus* Chapman, in the Exchequer Chamber.
Trin. 2. Car. Rot. 483.

7.
Hutt. 90.
1 Rol. 460.

ERror in the Exchequer Chamber of a Judgment in Debt in the Kings Bench, upon an Obligation of 200 l. conditioned, That if the Obligor should at all times well and truly pay, perform, and kèep all and singular the Rents, Covenants, Grants, Articles, Payments and Agrèements, which on his part are and ought to be performed, comprised in such an Indenture of Lease, &c. That then, &c. the Defendant pleaded generally performance of all Covenants, &c. The Plaintiff replyes and shews a breach for not payment of the rent at such a time, but doth not shew any demand of that rent, and thereupon the Defendant demurred, and it was adjudged for the Plaintiff.; and now the Defendant assigneth for Error, That for as much as the condition of the Bond is general, for the performance of all the Covenants, and not particularized for the payment of the rent, the rent is not payable without demand, and therefore the breach was not well assigned; and for that the Books of 14. Ed. 4. 4 & 22. Hen. 6. 52. were cited, but all the Justices and Barons held, That the Judgment is well given; for he pleading performance of the payments, covenants and agrèements, it shall be intended he had really performed them, and so had paid all the rents; and when the Plaintiff replyes, That he hath not paid such a rent, he nèeds not alledge a demand, for the Defendant may not say

Post. 421.
3 Cr. 829.
Hob. 8.
R. 414.

say it was not demanded, for then it should be a departure from his Plea, wherefore they held the Replication was good, and yet the Obligation being general for performance of Covenants, doth not alter the nature of the rent, but that it ought to be demanded; and upon this reason a case was cited, which was Pasch. 40. Eliz. Rot. 106. betwixt Specot and Sheers in the Common Bench; and the Judgment was affirmed. Co. Litt. 304. a. 2 Cr. 145. 423. 1 Rol. 443. Mo. 636. 3 Cr. 829. 1 Rol 466.

Rolte *versus* Sharp, in the Exchequer Chamber.

ERror in the Exchequer Chamber of a Judgment given in an Assumpsit in the Kings Bench, where the Plaintiff declared, That he at the request of A.S. made a Gown and Petticoat for the said A.S. which lay by him, because they were not paid for, That the Defendant in consideration the Plaintiff would deliver to the said A.S. the said Gown and Petticoat assumed and promised to the Plaintiff, That he would pay as much as the Gown and Petticoat were reasonably worth, alledging in facto, That he upon that promise delivered the said Gown and Petticoat to the said A.S. and that then it was reasonably worth fifteen pounds, and that he had requested the Defendant to pay it, and he had not paid it; the Defendant pleads non assumpsit, and found against him, and Judgment for the Plaintiff: And now Error assigned, That the declaration is insufficient, because it is alledged he promised to pay, and he doth not shew to whom he should pay it, so it is incertain unto whom the payment should be made. Secondly, there is not any consideration for the Defendant to be charged, for he hath not any benefit by the delivery to A.S. Thirdly, he doth not alledge that he delivered them to A.S. to her own proper use, and then the delivery to her is not material. Fourthly, the promise to pay for them tantum quantum, &c. is insufficient, but all the Justices held that the declaration is good; for as to the first, That he promised to the Plaintiff to pay, although he doth not say to whom he should pay, it is good enough; for it shall be intended to the Plaintiff, and to pay to another is idle; for the Plaintiff made the Cloaths, and the promise was to him to pay, therefore it shall be intended to be paid unto him, as in 4. Ed. 4. Obligation solvendum to the Obligor, is idle, and shall be in Law a good Obligation to the Obligee. To the second, That the consideration is good, for the delivery of those Garments out of his hands at the Defendants request, is a good and valuable consideration. To the third, That the delivery to A.S. at his request, is a very good consideration. To the fourth, it is the usual way to lay down in certainty, viz. That he should pay for it tantum quantum meruit, &c. and then to averr what it is reasonably worth, which being the common course and always allowed, Judgement was therefore affirmed. 8. Lat. 151. 272. Noy 83. Poph. 181. 1 Cr. 19. 2 Cr. 570. 3 Cr. 143. 3 Cr. 149. Ante 70. Post. 160. 273. Ante. 19. Post. 573. 2 Cr. 263. 3 Cr. 149.

Purchase

Purcase *versus* Jegon in the Exchequer Chamber.

9. Noy 85. Jones 140. Lat. 158. R 586. Co. 2. 5: a. Co. Litt. 46. b.

DEbt upon an Obligation of 200 l. conditioned for the payment of 100 l, upon the one and thirtieth day of September following, The Defendant pleaded payment the said one and thirtieth day, according to the condition of the Bond and Issue thereupon, and found that he did not pay, and costs and damages assessed, and Judgment given for the Plaintiff, and Error brought in the Exchequer Chamber, and the Error assigned, because the Verdict being upon the payment on the one and thirtieth day of September, is an idle and void issue, and so a void Verdict, and then the Judgement being given upon the Verdict, is ill; but the Plea of the Defendant is ill, and Judgment ought to have been given upon that and not upon the Verdict, sed nod allocatur, for there being no such day as the one and thirtieth day of September, and the Jury finding that the money was not paid upon that day, nor any time before, they find in effect it was never paid, which is a good Verdict, and Judgment well given thereupon; And therefore Judgment was affirmed.

Abr. 25. 54.

Termino

Termino Michaelis, anno tertio *Caroli* Regis, in Communi Bano.

Claphams Case.

NOte upon information to the Court, That an Habeas Corpus being awarded to the Court of Guilford in Surrey, to remove a cause there depending, they notwithstanding proceeded. Upon examination it appeared, That the Writ was delivered after the issue joyned in debt, viz per minas pleaded, and That the issue was joyned more than six weeks after the Action brought, so as by the Statute of 21. Jacobi. cap. 23. the Judge might refuse. It was resolved by all the Court, because it was in an Action of debt upon an Obligation of 200 l. not made within that Will, That the Statute doth not extend to this Case; for that provides against the removing by Habeas Corpus, such Actions only where the cause of Suit is properly arising within the Will. Secondly, for as much as the proceedings were before one who was Town-Clerk and Attorney of the Common-Bench, and not an utter Barrister (as he ought to be by an express proviso in the Statute, and such utter Barrister ought to be there present, and cannot have a Deputy, but such one as is an utter Barrister and present at the Tryal) It was resolved, That after the Habeas Corpus delivered the said proceedings were ill, and not warranted by the Statute, and their proceedings after an Habeas Corpus to Tryal and Judgment, were also void: Whereupon a Supersedeas was awarded; And the Judges of the Kings-Bench, being informed thereof, agreed, That their course in the Kings-Bench was to disallow proceedings in an inferiour Court after an Habeas Corpus delivered, unless it were a cause arising in the Will or Corporation. 1.

Oxford *versus* Rivett, Trin. 3. Car. Rot. 1684.

SCire facias against Katherine Rivett, Administratrix of John Rivett, upon a Judgment again the Defendant, as Administratrix, for a debt due by the Intestate. The Defendant pleaded, That the Intestate made his Will, and thereby constituted Edward Rivett his Son, within age, his Executor, and that Administration was committed unto her durante minore ætate, and that he upon such a day attained the age of seventeen years, and then refused to be Executor, and the Administration was committed to Sir Hugh Wirrell and that at the time that Edward Rivett came to 2. Hett. 33. Post. 92. 93.

to the age of seventeen years, she had fully administred all the Estate which came unto her hands, &c. The Plaintiff replies, That at the time the said Edward came to his full age, devastavit diversa bona of the Intestates, unde satisfecisse potuit to him his due debt, the Defendant rejoyns quod ipsa non devastavit aliqua bonorum &c. & de hoc ponit, &c. & prædictus querens similiter; and upon this it was tryed and found for the Defendant, and now alledged in arrest of Judgment, That here is not any issue joyned, and therefore a Mis-tryal not aided by any Statute; for in the replication he doth not alledge, That Katherina devastavit, but that devastavit; and Katherina is not named, but by a Parenthesis; but Richardson, Hutton and Harvie conceived it should be construed, That Katherina devastavit; for she was the Administratrix; and the other, by intendment, could not make the devastation. And the Replication is, That devastavit diversa bona, unde satisfecisse potuit the Plaintiff of his debt, which is a strong intendment that she devastavit, and it shall be a good intendment to aid it after Verdict. And she in the Rejoynder saith, Quod ipsa Katherina non devastavit; & de hoc ponit se super patriam, & querens similiter: And hereupon a Verdict was given, which the Plaintiff shall not avoid by an exception, to his own Replication. But Yelverton and I held, That an intendment shall not make a Replication good, and an Issue cannot be joyned, but where there is a direct affirmative and negative; but here is no direct affirmative quod devastavit; And the Court shall not intend it to be Katherine, more than another; and it may be that Edward Rivett the Executor non devastavit: But, quacunque via data, the Court, by intendment, shall not aid it, where there is no issue joyned; and the Verdict cannot help it. Vide resid. postea. pag. 93.

Ant. 64. 2. Cr. 67.

Co. Litt. 126. a Post. 94.

Fawkeners *versus* Bellingham, Mich. 22. Jac. rot. 490. Sussex.

3. Het. 28. 36. Jones 233. Post. 214. 215.

REplevin of the taking of three Oxen, upon the third day of September, anno vicesimo Jacobi Regis, apud East-Grænsted, in a place called Horse-shoe-Meadowe; The Defendant makes conusance, as Bayliff to Sir Henry Compton and John Blund, for that the place where, was ten Acres of Meadow, quodque diu ante tempus quo, &c. ultimus Presbyter celebrando divina in Ecclesia de East-Grænsted was seised in fee of a Messuage called Boyles, and of one hundred Acres of Land, forty Acres of Meadow, and thirty Acres of Pasture in East-Greensted, aforesaid, whereof the place where, time whereof, &c. and of all the time, &c. was parcell in jure presbyteratus sui, and held them of the Lord Windsor and John Sherry, as of their Manor of Brambleton in the County of Sussex, by fealty and rent of eighteen shillings and four broad arrows annually at Michaelmas, to be paid, and Suit of Court and Heriot. Of which Services the said Lord Windsor and John Sherry where seised, by the hands of the said last Presbyter,

Post. 215.

as

as by the hands of their *Veray-tenant*, and being thereof so seised, the said last Presbyter continued his possession, untill the Statute primo Ed. 9. cap. 14. of Chanteries, and shews the Statute with the saving of all Rents, Suits, and Services, whereby the King was seised in fee of the Tenements unde, &c. and that the said King anno quarto Regni sui granted them to Thomas Reve and others, whose Estate one John Cornford now hath, and that the said Lord Windsor and John Sherry were seised in fee of the said Manor of Brambleton, before the said Statute and after; And that after the said Statute, viz. in anno quinto Reginæ Eliz they infeoffed one Pickering of the said Manor and Rent, and so by divers mean conveyances the same Manor came to the hands of the said Sir Henry Compton and John Blund, in anno 14. Jacobi, and for the rent of eighteen shillings for one year behind, at Michaelmas anno 20. Jacobi, he made conusance as Bayliff to them, as in land chargeable to their distress, for the said rent in forma prædicta, and averrs, That Presbyteratus prædictus fuit in esse within five years before the Statute of primo Edw. sexti, and makes divers other averments, That the Lands were within the Statute, and that they were within the saving of the Statute. The Plaintiff in bar of the conusance pleads protestando, That the said Priest non tenuit and protestando to all the mean conveyances, pro placito dicit, That the said Sir Henry Compton and the said John Blund, nec aliquis alius, whose Estate they have in the said Manor, were seised of the said rent within forty years ante tempus quo, &c. and thereupon it was demurred, and this Case was oftentimes argued at the Bar and Bench: The sole question was, whether this rent be within the Statute of 32. Hen. 8. of limitations; for if it be, then no seisin being had within forty years (as is confessed by the Demurrer) he is to be barred of that conusance; and it was argued by Yelverton, Hutton, and Richardson for the Defendant. That although it be a rent within the words of the Statute, yet it is out of the intent of the Statute; for the Statute extends only to rents services, and rents by prescription, but rents which begun by Deed within time of memory, were created quasi by an Act of Parliament (and so their beginning known) are out of the intent of the Statute; for that intended only such rents, whereof seisin ought to alledged in an avowry, and being alledged shall bind the party, unless there be a travers; and when seisin is alledged, it is but formal, and not the substance, as it is where an Avowry is made of a Rent created by Deed, or reserved by Grant within time of memory; although seisin be there alledged, yet it is not traversable, but the Deed only which is the Title, as it is held Coke 8. Rep. fol. 94. Sir William Fosters case. and 10. Rep. fol. 108. Losells case. So rent created made by Act of Parliament, the beginning thereof being by the Act, that is his Title, and the seisin is not material; and although the said rent were a rent-service, yet the construction of the Act of primo Edw. sexti, it is

Lib. 5. 65. a.

F. N. B. 11. e.

Pl. Comm. 95. a.

turned into a Rent-ſeck, and the beginning of that turning being known, it is therefore as a Rent created by Parliament, and Yelverton and Hutton called it a Rent coming out of the womb of the Parliament, and therefore no time to have ſeiſin thereof within forty years, for the Statute preſerves it unto him; and as he hath loſs thereby as Lord, That he cannot have Eſcheats and other profits which a Lord hath, ſo hath he benefit, that *laches* of time or ſeiſin, although an hundred or two hundred years ſhall not prejudice him, and therefore compared it to the Caſe of a Rent-charge by Deed, or a Rent granted upon equality of partition, in an Avowry for them; although ſeiſin be alledged, yet it is not material nor traverſable, nor is it of neceſſity to alledge it; And this Statute of primo Ed. 6. taking away the Signiory, the Rent which is the fruit ought to be conſtrued as liberally and beneficially as may be, and this Avowry is grounded upon the Statute of primo Edward. ſexti. which he ſhews in his Avowry, and therefore is out of the Statute of Limitations, which extend to Avowries at the common Law: But they agreed, That it is the ſame Rent in eſtate as it was before (viz.) if it were an Eſtate for life the remainder over, ſo it ſhall be now; and if it were deſcendible on the part of the Mother, ſo it ſhall now deſcend in the ſame manner: But it is altered in quality, for it is turned into a Rent-ſeck, and the beginning thereof being known, is therefore out of the Statute, id eſt, out of the intent of the Statute, although not out of the words, and compared it to the Caſe where confirmation is within time of memory, to hold by ten ſhillings rent, whereas before he held by twenty ſhillings rent: Although there were not any ſeiſin of this rent within forty years, yet it is out of the Statute; as if Judgment be in a per quæ ſervita, ſuch Rent is out of the Statute, becauſe there is a Record thereof; ſo for as much as this Rent is turned in to a Rent-ſeck by the Parliament, it is out of the Statute; But it was argued by Harvie and my ſelf to the contrary, That this is within the Statute, for the Statute extends to all Rents, Suits and Services, ſo it is within the words; and we alſo conceived it to be within the intent; for although it be a new Rent-ſeck, and was before a Rent-ſervice, and the time of the alteration thereof is known, yet becauſe the beginning of the creation of this Rent is unknown, and it is the ſame Rent it was before (for it is parcell of the Manor as before) as 31. Aſſiſ. fol. 23. which proves that it is an ancient Rent, time whereof memory, &c. And alſo the ſeiſin before it was turned into a Rent-ſeck, is ſufficient to have an Aſſiſe, as Coke Rep. 4. fol. 9. Bevills Caſe; and therfore the Rent being an ancient Rent is diſtrainable of common right, and that this is not a new Rent made or created by the Statute of primo Edw. ſexti appears by this, becauſe the Statute ſaves only all ancient Rents, &c. and by conſtruction of Law this ſhall be taken to be and ſaved to the Lord as a Rent-ſeck, becauſe the King cannot be a Tenant nor hold of any, as the Tenant before did, Vid.

Co. Lit. 153. a

Lib. 8. f. 118. b. Co. Litt. 1. b.

14. Eliz

14. Eliz. Dyer 313. Coke 1. fol. 47. a. and this Rent is not as a Rent given by the Statute, for a saving in an Act of Parliament is no giving of any new thing, unless in some special case, being a saving of that which was in esse before, and it is quasi an Exception or Forejudge out of the Statute, as it is held in Plow. Comm. 563. 35. Hen. 6. 34. 26. Assises fol. 66. 8. Ed. 3. 67. 9. Ed. 3. 27. Hen. 8. Title Parliaments 77. So this saving being general doth not give this rent, but is a saving of it out of the Statute, where otherwise it would have been extinguished and lost; For every one is intended to give all their rights in such lands or rents issuing out of the same, but only such as are saved thereby: So the Statute doth not give nor make any new thing by the saving, but saves that which before was in being, and so it is the same rent: And this is proved by the averment, That he had such rent before: So it is not to be compared to a rent made or created by a Deed or Record, within time of memory; for this is a rent, whereof the beginning is not known, and therefore of necessity seisin must be alledged thereof in an Avowry; And this seisin is always traversable, for in an Avowry the seisin is the principal matter which ought to be alledged, and it shall be traversed, as it is held in 22. Hen. 6. Cok. 9. Rep. fol. 34. 36. a. Bucknalls Case. 27. Hen. 8. fol. 4. & 20. 34. Hen. 8. averment 113. and seisin alledged ought to be confessed and avoided, as by coertion of distress, or traversed, and a travers shall never be of a seisin generally, but ever of a seisin within time of limitation, as the Books be Dy. 107. 315. Cok. 8. Rep. fol. 64. Warrens case cited in Fosters case 10. Hen. 6. 6. Keilw. 13. Hen. 7. fol. 31. 21. Hen. 7. 7. Dyer 330. And whereas it was affirmed, That seisin should not be alledged or traversed, because the Rent is changed within time of memory; that cannot be a reason, for then when the Lord purchaseth the Tenancy or *Mesnalty*, he shall have a surplusage of the Services, which are notwithstanding distrainable of common right, as the Book 2. Ed. 3. Extinguishment 1. 20. Ed. 3. Avowry 126. & therefore it is against Law, That the Lord should be bound in that case, to any time of seisin; And this Statute of Limitations is favourably to be expounded, to repress the mischiefs, and not to be enlarged in time further than the Statute appoints, as Plowd, Comm. fol. 371. per Catim in cases of Fines, which is the reason there given, That Copyholds are within that Statute, and it being within the mischief and remedy intended by the Statute, ought to be construed according to the Rules in Coke 3. Rep. fol. 7. Heydons case, wherefore they concluded for the Plaintiff; But by reason of the opinion of the other three Justices, Judgment was given for the Defendant: But afterwards a Writ of Error being brought in the Kings Bench upon the point in Law, the Judgment was reversed, quod vide postea. pag. 214.

Post. 101.

Co. Litt. 268 b
Pl. Comm. 95. a

Ant. 45.

4. MEmorandum, In the laſt Vacation, one, Servant to Serjeant Headly uſually attending on him, was arreſted upon a Proceſs out of the Court of the Marſhalſey, and thereupon obtained a Writ of Priviledge out of this Court, reciting, That Serjeants at the Law which are attending this Court, and their Servants ordinarily waiting upon them, ought to enjoy the priviledge, to be ſued in this Court; wch being delivered to the Steward of the ſaid Court, he would not allow thereof, ſuppoſing Serjeants at Law ought not to have ſuch priviledge, for them and their Servants, and that he might not be ſued by bill filed againſt him, as 11 Hen. 6 8. Dy. 24. Book of Entries 430, 431. And now this matter was moved to this Court, That they ought to have the priviledge, for they are properly attendant at this Barr, and none others are admitted to practiſe here; and although peradventure it may be doubted, whether he may be ſued by bill filed, becauſe there cannot be a *fore-Judger* againſt him, yet he may be ſued here by original: and preſidents were ſhewn, one where Martyn Serjeant was arreſted in London, at the Suit of the Biſhop of Wincheſter, and at the Suit of others, and had a Writ of Priviledge reciting, That Serjeants at the Law were to be attendant to the ſaid Court, ex officio plus quam alibi, and that their ſervice was neceſſary at this Barr, and therefore commanded them to ſurceaſe, and to proſecute their Suits in the Common-Bench; whereupon it was allowed, and the party diſcharged, of the Suit in Court of Marſhalſey. A Copy of the Record and Writ produced, was as followeth.

Rex Majori & Vicecomitibus London, &c. cum omnes & ſinguli de Curia noſtra de Banco, in veniendo verſus Curiam noſtram, ibidem morando & exinde verſus propria rediundo ſub protectione noſtra eſſe debeant, & à totis temporibus retroactis conſueverunt, Juri convenit ipſis, & quibus in eadem Curia, Nos de noſtris Ligis, conſervare dignemur exhiberetur pro eiſdem noſtrum privilegium ſpecialius protegi quietius defendere. Nulli liceat Judici ſeculari placita verſus eos mora, niſi in feloniarum Appealorum, vel liberi tenementi cauſis alibi, quam in Banco prædicto cognoſcere vel tenere; Quidam tamen *Henricus* Epiſcopus *Wintoniæ*, & *Johannes Podridg* Curiæ noſtræ prædictæ privilegia, neſcientes, nec ingendo, nec indigendo Miniſterium *Johannis M.* ſervientis ad legem: Qui ex officio incumbit in Curia illa potius quàm in alia miniſtrare, præſertim cum eadem Curia ulterius gradus perſonarum, quam ſervientes ad legem non permittit, diverſas debitorum querelas (viz.) prædictus Epiſcopus unam ſuper demandum 100 l. & prædictus *Johannes Podridg* alteram ſuper demandum de 12 l. verſus ipſum *Johannem M.* &c. coram vobis Præfatis Majori tenendas affirmarent, & per certa bona ſua per Miniſtros veſtros attachiari, contra prædictæ Curiæ noſtræ privilegium, minus debite procurarent. Voſque prefatus Major querelas prædictas coram vobis in Curia veſtra circiter prædictas ſummas perſiſtitis terminand. prout ex ipſius *J. M.* querela accipimus, unde nobis

bis ſupplicavit ſibi per nos de remedio provideri; Et quia eidem *J. M* fieri, quod eſt juſtum, & libertati & privilegio Curiæ prædictæ inviolabiliter obſervari volumus, vobis præcipimus, quod vos præfatus Major ſi querelas prædictas vel earundem alteram ſumpſeritis, aliquin vos præfati Vicecomites de placitis ſuperſedeatis, querela vel earundem alteram coram vobis, & quemlibet veſtrum de placitis illis, & aliis quibuſcunque verſus præfatum *J. M.* quocunque nomine cenſeatur, coram vobis ſedente Curia noſtra de Banco prædicto, motis vel movandis ſuperſedeatis omnino. Teſt. &c. **Note this Writ well, That Serjeants only, ſhall attend at the Common-Bench, and ſhall be impleaded there; and not elſewhere.** Hill. 26 et 27. Car. 2. B. R.

5. *Memorandum*, That *George Vernon* a Reader of the *Inner-Temple*, received in the time of the laſt long Vacation a Writ to be Serjeant, returnable *Menſe Michaelis*, and thereupon he appeared upon the laſt day of October, which was the *quarto die poſt*, in Chancery, yet the Prothonotary ſaid, That he might have appeared there the firſt day, or any day before the fourth day; & being ſworn in Chancery; he had afterward day given him to appear in the Common-Bench, untill the 8th of November, at which day he came in the Morning to *Serjeants-Inne* in *Fleetſtreet*, accompanied with the Benchers, & others of the Society of the *Inner-Temple*; & there, before the Juſtices of the ſame Houſe, & the Lord *Richardſon* chief-Juſtice of the Common-pleas, the other Juſtices of *Serjeants-Inne* in *Chancery Lane*, not being preſent, he went in attended with the Warden of the Fleet & the Uſher of the Exchequer, & there without any ſpeech made (as the uſual courſe is by chief-Juſtice) he recited his *Count*, & after demand of the *Oyer* of the Writ by one of the Serjeants, and the Writ read by the chief Prothonotary, and *defence* made by another Serjeant, he kneeled, and his Coyfe & Hood were put on, and he diſmiſſed, and afterward, the ſame day went to the Common-Bench, & was there preſented by two of the Kings ancient Serjeants, and then recited his *Count*, and *Defence* was made, and the Writ read, and he placed in his place of puiſny Serjeant. Mr. *George Wild* one of the utter Bariſters of the *Inner-Temple*, delivered Rings for him with this Inſcription, *Rex legis Regnique Patronus*, & afterwards, upon the ſeventeenth day of November the ſame Term, he was made one of the Barons of the Exchequer, Ant. fol. 67.

Mr. Brownlow chief Prothonotary, ſhewed unto me theſe preſidents Mich. ſexto Jacobi Regis rot. 1001. Lovelace *verſus* Cockett. Hob. 68.

9. DEbt upon a Bond. The Defendant pleaded acceptance of another Bond in diſcharge of the Obligation aforeſaid, and ruled by the Court to be ill; and Mich. 2. Jacobi rot. 3272. Debt by 2 Cr. 579. Poſt. f. 193. 2 Cr. 100.

by Branthawte againſt Cornwallis: He pleaded acceptance of a
Co.lib.6.44.b. Statute-ſtaple after the day of payment, and no Plea. And Trin.
41. Eliz. rot. 1409. Maynard verſus Crick. Debt upon a Bond.
3 Cr.716. The Defendant pleaded acceptance of another Bond in ſatisfacti-
Co. Lit.212.b. on of the firſt Obligation, and it was ruled by the Court to be no
Hob. 68. 9. good Plea. And Trin. 14. Jac. rot. 734. Oliver verſus Leaſe. Debt
upon a ſingle Bill. The Defendant pleaded, That he infeoffed the
Plaintiff of ſuch land in diſcharge of the ſaid Bill, which he ac-
Co.Litt.212.b. cepted, and it was held to be an ill Plea, Vid. 4. Hen. 8. Dyer 1.
Moor. 871 12. H. 4. 23.

Young *verſus* Young.

7. FOrmedon *in deſcender.* After Judgment upon a Verdict, the
Hutt. 92. Record being removed by a Writ of Error, it was moved to
Jones 177. have it amended in the Philizers Roll, viz. whereas the Defendant
Hetl. 52. was admitted before Juſtice Jones, Paſch. 22. Jacobi, being then
Juſtice of the Common-Bench, to proſecute in omnibus Actionibus,
and this was entred in the Plea Roll, and viewing the Roll, 't was
quod conceſſum eſt per Curiam, That the Defendant by ſuch a one,
his Gardian ſhould proſecute, &c. and ſo it is entred in the Re-
membrance. And the Philizers Roll is, That John Young by J. S.
his Gardain ad hoc admiſſus per Curiam, obtulit ſe quarto die, &c.
But there was no entry in the Philizers Roll (as is uſually in
R. 399. ſuch caſes) quod conceſſum eſt per Curiam, quod petens ſequatur
per J. S. his Gardian; whether this may be amended and inſerted,
was the queſtion; and all the Court held it might well be amend-
ed, notwithſtanding the Writ of Error brought and the Record
removed; becauſe it appears by the note under Juſtice Jones
hand, That he admitted the Gardian ad proſequendum, and by
the ſeveral entries it appears, That he ſued by his Gardian, and
the entry in the Roll in the Philizers Office, is quod obtulit ſe; ſo
the admittance of the Gardian appearing to be before the Obtulit,
it is the omiſſion of the Clerk, or rather the Act of the Court, which
did not cauſe it to be entred in the Philizers Roll; it ought not
R. 33. therefore to prejudice the party, no more than the not entring of a
Warrant of Attorny, when it appears he hath a ſufficient War-
rant of Attorny, which hath oftentimes been uſed to be entred upon
examination of the truth, although a Writ of Error be then
brought; wherefore by the rule of the Court it was ordered to be
amended, but ſome doubt was made, whether admittance to ſue by
Gardian, where it ought to be by *prochin amie* be good, as it is in
Fitz. Nat. brev. 27. h. but the Court delivered no opinion therein,
2 Cr. 640. 1. becauſe there were many preſidents, that ſuch entries had been
Reſolv. p. 161. both ways.

Kirtons

Kirtons Case, in the Court of Wards.

Note Upon an Assembly of all the Justices and Barons in Serjeants-Inne in Fleetstreet, The Case was propounded before them by Hide chief-Justice, which had been argued before the two chief-Justices, and chief-Baron, being the Case of one Kirton referred unto them out of the Court of Wards. A man mortgageth upon condition, That if he or his Heirs repay 100l. at such a day, he shall re-enter: He dies leaving issue a Daughter only, his Wife being *priviement enseint* with a Son, the Daughter and Heir at the day payes the 100 l. and afterwards the Son is born; Whether the Son shall enter upon the Sister, or if she shall retain it for ever, was the question? vid. Coke 1. Rep. fol. 95. a. 99. a. Shelleys Case, That the Daughter which paid the money shall retain it; for qui sentit onus sentire debet & commodum, and 9. H. 7. 21. by Wood That if the Daughter enter for a condition broken, and afterward a Son is born, the Son shall not take advantage; &c. because he hath not any right at the time of his entry; and it was held by Hide chief-Justice, Walter chief-Baron, Denham, Hutton, Whitlock, Harvie, Yelverton, and my self, That the Sister shall retain it against the Son born, after performance of the condition; for in as much as she paid the money (and if she had not paid it, the land had been lost) if she could not retain the land against the Son, she hath no remedy for the money, and by payment thereof she hath gained the land, and is in, as a Purchasor, although she were intituled thereto by the condition, and as Heir, and she shall retain it as she shall the *perquisite* of a Villain, and as land gained by her vigilancy; for otherwise it should be lost to both, and she should lose both land and money; therefore the Law wills, That she shall retain the land. But Richardson chief-Justice of the Common-Bench, and Dodderidg held strongly the contrary, because she hath it as Heir, and then the nearer Heir being born shall defeat it; And it was in her a voluntary act to pay the money, which she might well have omitted, and she paid it of her own head, and at her own perill; Jones and Trevor puisny Barons doubted thereof, and would not deliver any opinion, but rather inclined that the Son should have it. 8. Hob. 3.

Halleys Case.

Ejectione firmæ, upon a Lease of a Messuage in Oxon. The Defendant being Principal of Glocester-Hall in Oxford, pretended, That he being a Scholar in Oxford, and a privileged person, ought to be sued before the Vice-Chancellor in Oxford according to their course of proceedings there, secundum morem Universitatis, and according to the Charters granted to the Universities in anno 3. Rich. 2. & anno 14. Hen. 8. and confirmed by Parliament 9. Ante. 73.

ment anno 13. Eliz. Regin. wherefore he prayed there might be a stay of the proceedings in this Court, and shews their Charters, That they had conusance of all Suits, Contracts, Covenants, Quarrels, (except concerning freehold) and this being a personal Action, they ought to have conusance thereof; and Damport for the University shewed an ancient Record in this Court in anno 22 Edwardi primi, where a Plea of Covenant was brought in the Court of the Vice-Chancellor of the University of Oxford, by reason of a contract made before that time, wherein was granted unto them, That they should have conusance of all Actions personal and Contracts; and this Covenant in question was, That he should enjoy such an house in Oxford for a year; and because this Court of the Common-Bench had granted a prohibition to stay the proceedings in the said Suit, being begun in the Court-Christian, before the Vicechancellor; The Record mentioned, that upon the shewing of this Charter, it appearing, the Action was brought only upon the Contract, and not pro Domibus, therefore a consultation was granted; and it was prayed here, because this Action was but personal, That they might have conusance thereof; but all the Court denyed it, and affirmed that the Vicechancellor had not any Jurisdiction, nor might hold Plea thereof; For in this Action he shall recover possession, and shall have an Habere facias possessionem, and thereby he that hath a Freehold may be put out of possession: and it is not like to the Record shewn, for there it is only an Action of Covenant, wherein the Plaintiff shall recover damages only, and therefore reason to grant a Procedendo there; but here he shall recover possession, and therefore by their own rules they ought not to hold conusance, nor have liberty to proceed in this Case. Note that by this ancient Record, it appears what are the privileges of the said University, and the Jurisdiction of this Court to grant a Prohibition where they proceed in Court-Christian, in prejudice of the common-Law, without resorting to the Chancery.

Co. 5. 105. a. Lib. 9. 78. a.

Whytmore *versus* Porter.

10. SIR William Whitmore and others, Executors of the Lady Craven, against Elizabeth Porter Executrix. In the Exchequer upon a special Verdict, the Case was; The Defendant as *Executrix de son tort demesn* takes divers goods into her hands, to the value of 400 l. and sells them by the assent and direction of John Porter her Son, who afterwards takes letters of administration, and paid the just debts upon specialties, as far as the goods of the Intestate amounted unto, as well to the value of the said 400 l. sold by his Mother, as of all the goods whereof the Intestate dyed possessed; and after that an Action of debt was brought against the *Feme* as *Executrix de son tort demesne*, who pleaded *plenument administravit*; and upon evidence all this matter was disclosed, and whether she shall be chargeable or not, was the question?

queſtion, and adjudged by all the Barons, who delivered their opinions ſeriatim, That ſhe ſhall not be charged, but that the Plaintiff ſhall be barred; For this Action being brought after the adminiſtration committed, and when ſhe was chargeable for thoſe goods to the Adminiſtrator, and when the Adminiſtrator had fully ſatisfied in paying the debts of the Inteſtate, as far as all the goods of the Inteſtate amounted unto. It is not reaſon ſhe ſhould be charged againſt the Plaintiff, for then ſhe ſhould be double charged, viz. to the Adminiſtrator, and alſo to the Creditors; alſo it is not reaſon that more ſhould be ſatisfied out of the goods of the Inteſtate unto the Creditors, than the goods of the Inteſtate amounted unto, and ſo much being ſatisfied by the Adminiſtrator, they ſhould not have more; But if the Action had been brought againſt her before the Adminiſtrator had fully adminiſtred all in debts, peradventure it might have been otherwiſe; For ſhe having gained goods into her hands, is chargeable for them, as *Executrix de ſon tort demeſn*, untill ſhe gives ſatisfaction for them to the true Adminiſtrator, or ſhe her ſelf ſatisfie for the true debt to the value; Whereupon it was adjudged for the Defendant.

2 Cr. 565. Vid. Hob. 49.

(Vent. 349.

Hob. 49.

3. Cr. 406.

Kinaſton *verſus* Moor, Hill. 2. Car. rot. 850

11.

ERror in the Exchequer Chamber of a Judgment in the Kings Bench in Action *Sur Trover* and *Converſion* of divers goods, & inter alia of 190 l. in pecuniis numeratis. Upon not guilty pleaded and Verdict found for the Plaintiff, and entire damages given, Error was aſſigned, becauſe *Trover* and *Converſion* cannot be of money out of a bag; But all the Juſtices and Barons agreed, That it well lies; For although it was alledged, That money loſt cannot be known; and ſo whether it was the Plaintiffs money, whereof the *Trover* and *Converſion* was, as is the charge of this Action, yet the Court ſaid, it being found by a Jury that he converted the Plaintiffs money (for the loſing is but a ſurmiſe and not material, for the Defendant may take it in the preſence of the Plaintiff, or any other, who may give ſufficient evidence, and although he take it as a Treſpaſs, yet the other may charge him in an Action upon the Caſe in a *Trover*, if he will) The Plaintiff had good cauſe of Action; Wherefore the Judgment before well given was now affirmed, and the Juſtices and Barons ſaid, That this Action lies as well of money out of a bag, as of corn which cannot be known.

1 Rol. 5. 3. Cr. 819.

Ant. 18. 19. Poſt. 544. 2 Cr. 262.

R. 116.

Young *verſus* Pridd, Hillary 2. Caroli, rot. 778. in the Chequer Chamber.

12.

TReſpas by the Husband alone. For that the Defendant the fourth day of October anno 22. Jacobi Reg. aſſaulted verberavit & male tractavit the Wife of the Plaintiff, and carryed her away with ſuch his goods, and

detained her for half a year per quod ſolamen & conſortium quæ habere potuiſſet with his ſaid Wife he loſt, & alia enormia ei intulit ad damnum, &c. Upon not guilty pleaded, and found for the Plaintiff, and Judgment, Error was brought in the Exchequer Chamber, and aſſigned, That the Husband hath brought this Action for the battery of his Wife, which he cannot do without his Wife, and hath recovered damages, for this Battery, and therefore the Judgement erronious; but all the Juſtices and Barons held, That the Husband in this Action did not recover damages for the Battery of his Wife, but for the loſs which he had in wanting her company, and the per quod conſortium, and abduction of her is one entire conjoyned Act, and for that cauſe the damages were given, and for the Battery, true it is; That the Wife ought to have joyned to recover damages, and this Verdict and Judgment do not barr the Wife, to have an Action after the death of her Husband for the Battery, or ſhe may joyn with her Husband in another Action, and a preſident was ſhewn, Paſch. anno 17. Jacob. Reg. rot. 167. or 157. betwixt Hyde and Sciſſor, where ſuch an Action was brought verbatim, as this Action is in the Kings Bench, and recovered, and afterwards Writ of Error was brought, and the Judgment affirmed, and ſo all the Juſtices and Barons here held; Whereupon this Judgment was alſo affirmed.

2 Cr. 502. Yelv. 89.

Ant. 36. 2. Cr. 77. Poſt. 175.

2 Cr. 538.

More *verſus* Hodges, in the Exchquer Chamber.

13. Poph. 260. Noy. 83. Lat. 15.

ERror of a Judgment in the Kings Bench in Aſſumpſit after Verdict and Judgment, the Aſſumpſit being for the payment of a thouſand pounds for a marriage Portion, and Verdict for the Plaintiff upon non aſſumpſit pleaded, and Judgment accordingly; the Error aſſigned was, That the Iſſue was joyned; Trinity anno ſecundo Caroli Reg. and the Venire facias bears date quarto die Maii, anno ſecundo Car. Reg. which was before the Iſſue joyned, ſo the Tryal thereupon was ill; and by a Writ of Certiorare upon Diminution alledged, to certifie the Writ of Venire facias and Diſtringas, whereupon the Tryal was had, they being certified, the Writ was of the date of quarto Maii, which was in Eaſter Term, ſed non allocatur; for the Tryal upon the Diſtringas, and the Roll of awarding the Venire facias being good enough, the miſdating of the Venire facias (which is a judicial proceſs) is no cauſe to ſtop the Judgment, for it is but a miſ-ſuing of the Proceſs at the moſt, and aided by the Statute of Ieofails, and the Court intends that there was another Venire facias according to the Roll, and ſubſequent to the Iſſue, and ſo mentions the Roll, and the Diſtringas upon which Writ the Tryal is by Niſi prius made long after the Iſſue, and therefore the Tryal is good, and ſhall be intended, That there was another Venire facias warranted by the Roll, and now wanting, and that this Venire facias now certified, is not the Venire facias, whereupon the Tryal was had; wherefore notwith-

Ant. 54.

Ant. 38. 2 Cr. 64. 458.

Poſt. 595.

Moor. 402.

Poſt. 272. 91. 282. 327.

ſtanding the erroꝛ aſſigned, it was held by all the Juſtices and Barons, That the Tryal was good, and aided by the Statute of Jeofayles. The ſecond Erroꝛ aſſigned was, Becauſe upon the Venire facias is returned ſummonitus eſt, where it ought to have been Attachiatus eſt. Sed non allocatur, becauſe it was but matter of foꝛm, which ſhall not be pꝛejudicial after Verdict: Whereupon the Judgment was affirmed. 2 Cr. 108. 2 Cr. 89.

Howell John *verſus* Thomas, Trin. 1. Car. Rot. 158. in the Exchequer Chamber.

ERroꝛ, in the Exchequer Chamber, of a Judgment in the Kings Bench, in an Ejectione firmæ. The Erroꝛ was aſſigned, becauſe in the Bill the Plaintiff declares, upon a Leaſe foꝛ three years, but in the Plea-Roll, whereupon the iſſue is joyned, and in the Recoꝛd of Niſi prius, it is upon a Leaſe foꝛ five years; ſo the Bill and Declaration varies, and diminution was alleadged by the Plaintiff, and by Certiorare the Bill was certified, That it was only foꝛ three years; And hereupon Erroꝛ being aſſigned, the Defendant, in the Writ of Erroꝛ, when the Plaintiff alledged diminution of the Roll, had thereupon another Writ of Certiorare, whereby the Bill was certified, wherein he declared upon a Leaſe foꝛ five years; So it well warrants the Declaration upon the Roll, and the Niſi prius; And which of theſe certificates ſhould be allowed was the queſtion? And it was held by all the Juſtices and Barons, That the ſecond Certificate upon the diminution alledged by the Defendant in the Writ of Erroꝛ, ſhould be received; foꝛ the Bill certified upon it, is intended the true Bill, foꝛ it warrants well the declaration upon the Roll, and the Recoꝛd of Niſi prius; and the other ſhall be intended a fictitious Bill, and not the true one, and the allegation of diminution by the Plaintiff in the Writ of Erroꝛ, and pꝛocuring a Certificate, ſhall not ſtop the Defendant, without aſſigning of Erroꝛs to alledge a diminution, and from pꝛocuring the true Bill to be certified: So it is where the Plaintiff in a Writ of Erroꝛ alledgeth diminution, and pꝛocures an oꝛiginal to be certified, which doth not warrant the Judgment. If in truth there be another Writ-oꝛiginal, which well warrants the declaration, the Defendant in the Writ of Erroꝛ, foꝛ affirmance of the Judgment, may well alledge diminution, and have a Certiorare to pꝛocure the true oꝛiginal Writ to be certified: Whereupon the Judgment was here affirmed. 14. Moor. 701. 2 Cr. 131. 2 Cr. 597. Ant. 90. 2 Cr. 131. Ant. 90. 282. 327.

Wolfe *verſus* Hole.

WOlfe Attoꝛny of the Common-Bench bꝛings an Attachment of pꝛiviledge againſt Hole, and declares in an Action of the Caſe upon an Aſſumpſit, and after Verdict foꝛ the Plaintiff, and Judgment, Erroꝛ was bꝛought and aſſigned, becauſe there 15. Hutt. 92. Heel. 59.

were no pledges entred upon the imparlance-Roll; and now Henden moved, That this might be amended, and pledges inserted; for in the Nisi prius Roll there the pledges are mentioned, which is sufficient to induce the Court, and he said it was but matter of form, and aided by the Statute of decimo octavo Elizab. Reg.
2 Cr. 414. cap. 13. after Verdict, but the Court denyed the amendment: for although the Issue-Roll shall be amended by the Imparlance-
Ant. 45. Roll, because it is precedent, yet the Imparlance-Roll shall not be
3 Cr. 367. amended by the Issue-Roll, being subsequent: Also the Record
Hob. 76. being removed they would not amend it, for they said it was not
Moor. 403. form but substance, Vide. Dyer. 288. 18. Ed. 4. 9.

Phelps *versus* Lane.

16. ACtion, for that the Defendant said of the Plaintiff in presence of divers of the Kings Subjects, Thy Father is a Thief, Innuendo the Plaintiff; After Verdict upon Not Guilty, it was moved, That this declaration was not good, because it was not alledged to be spoken to the Son of the Plaintiff, nor in their presence, and the word Innuendo helpeth not, and of this opinion
2 Cr. 444. were all the Justices; Wherefore it was adjudged for the De-
2 Cr. 231. fendant.

Hilton *versus* Robert Pawle, Hill. 2. Car. rot. 630.

17. TRespas, for the taking a Saddle of the Plaintiffs at Stoke-
Jones 356. goldingham: Upon Not Guilty a special Verdict was found,
Hutt. 93. viz. That the Parish of Hinkley in the County of Leicester is, and
Post. 394. 395. time whereof, &c. was an ancient Rectory and Parish Church, and that the Village of Stoke-goldingham is an ancient Village, and parcell of the Rectory of Hinkley aforesaid; and that from the time of King Hen. 6. and always afterward untill this present, there is and hath been a Church in the said Village of Stoke goldingham, which, during all the said time, hath been used and reputed as a Parish, and that the Inhabitants of Stoke-goldingham aforesaid, during all the said time, have had all parochial Rites and Church-wardens, and that the said Village of Stoke-goldingham is distant from Hinkley about two miles, and if super totam materiam in forma prædicta Compertam videbitur Justiciariis & Curiæ hic, That the aforesaid Village of Stoke-goldingham be such a Parish as by the Statute of 43. Eliz. cap. 2. for relief of the poor, is chargeable to the maintaining their own Poor: Then they say the Defendant is guilty, to the damage of 7 l. and costs 40 s. and if super totam materiam in forma prædicta Compertam videbitur Justiciariis hic, That the aforesaid Village of Stoke-goldingham stands chargeable by the Statute aforesaid, to maintain the poor of Hinkley aforesaid; Then they say that the Defendant is not guilty: And upon this Verdict, being argued at the Barr by

Athoe

Athoe for the Plaintiff and Berkley for the Defendant, the Court resolved and delivered their opinions seriatim for the Plaintiff, That this is such a Parish within the Statute of 43. Eliz. as is chargeable for the relief of the Poor of Stoke-goldingham, and not for the poor of Hinkley; For being found, That it was a Church in the time of King Henry the first, & tunc & semper postea reputed for a Parish, and not in the negative, That it was not a Parish before: It may be well intended to be a Parish before, & it doth not exclude, That it was not before time whereof, &c. And although it should not be so intended, yet being found, That it was a Church then, and that there were Church-wardens there, it is a Parish within the Statute, although it be but a reputative Parish; for being in use so long before the Statute, and at the time of the Statute, the Statute appoints that the Church-wardens and three or four Overseers of the Poor joyned with them, shall, &c. and no Church-wardens of Hinkley are Church-wardens of Stoke-goldingham, and by consequence have nothing to do there, and the Church-wardens of Stoke-goldingham are only to meddle with the Church there, & by consequence with the Poor of the Parish; and the Statute hath an intention to confine the relief to Parishes then in esse, and that every Parish should meddle with his proper Village, and their Poor are to be provided for there, and not elsewhere; Wherefore it was adjudged for the Plaintiff. Vide Nicholls case. fol. 394. Post. 355. Hob. 67.

OXford *versus* Rivett ante. 79. was now moved again, and Richardson, Hutton, and Harvie held their former opinion, That the Issue was well enough joyned, for there is no mention of any who devastavit in the replication; and necessarily it is intended, That the Mother of the Executor devastavit, for no other might make a devastation; and the Rejoynder being quod prædicta Katherina non devastavit, & de hoc poc poiñt se super patriam, & querens similiter, and being found for the Defedant quod non devastavit the Plaintiff shall not avoid that Verdict by saying, That it is not shewn who devastavit, so to take exceptions at his own Replication; and Hutton said, admitting that no Issue be joyned, and that the Verdict might not aid it, yet the Judgment shall be against the Plaintiff, for his replication is ill for another cause; for in the Barr the Defendant alledgeth, That she had administration committed unto her durante minore ætate of Rivett the Son of the Intestate, and that he came of age in 9. Jacobi, and that afterwards he refused to be Executor, and the administration was committed to Sir Hugh Wirrell 3 Decemb. anno 19. Jacobi, the Plaintiff replies, That before the commission of the Administration to the said Sir Hugh Wirrell, viz. 6. Octob. 19. Jacobi devastavit, which admitting it should be intended that Katherina devastavit, yet that was a devastation after Rivett the Executor came of age (who came of age in 9. Jacobi, and then she might not be chargeable therewith: So the allegation that devastavit 19. Jacobi is ill, and therefore 18. Her. 60. Ante 79. 80.

for Judgement ought to be given against the Plaintiff, but for the other point Yelverton & my self held our former opinion opinion, That here is no issue, for intendment will not aid a Replication, and being no issue, the Verdict is void, and not aided by any of the Statutes of Jeofayles; but by the opinion of the other three Justices Judgment was given for the Defendant.

) Ante 80.

Westley *versus* Allen.

19. A Prohibition was prayed for Westley against Allen, to stay a Suit in the spiritual Court, concerning the Probate of a Will which was of goods and land, which Will was alledged to be revoked (and so it proved) upon a Suit at the common-Law for the land. Upon Issue of non devisavit, it was proved to be absolutely revoked in toto, and a non devisavit found; and now the Suit is in the spiritual Court to prove it to be a good Will and not revoked. Upon this suggestion the Court gave day, if cause were not shewn to the contrary, That a Prohibition should be granted; Post. 115. For the Court held, That if the question had been in the spiritual Court for Probate of a Will of goods and land, and making an Executor, That they should not proceed to prove the Will quoad the land, but that a special Prohibition as to the land should be granted. Post. 166. Moor. 873. Post. 396. 1 Vent. 207.

Morant *versus* Cumming.

20. Hetl. 60. 1 Rol. 655. Jones. 387. MOrant Lessee of the Earl of Hertford against Cumming Vicar of Lirbeck, prays a Prohibition to stay a Suit in the spiritual Court for Tythes, because the lands were parcel of the Forest of Beare, whereof Kings James was seised in fee in jure Coronæ, and he and all his Predecessors held it discharged of payment of Tythes, and granted it to the said Earl of Hertford in fee, & so he ought to hold them discharged: And it was doubted whether the Patentee may have such privilege, or that it be only a privilege annexed to the Crown during the time that the land was in the Crown; but it was granted de bene esse, unless cause were shewn to the contray such a day. Co. 2 44. a. 1 Rol. 655. 3 Cr. 785.

Owen *versus* Thomas app Rees, Hillar. 2. Car. rot. 1789.

21. Het. 22. 27. ACtion *Sur Trover* of twenty loads of Wheat, &c. Upon Not Guilty pleaded, and a special Verdict, The first question was, Whether a Lease for three lives by Indenture, dated the thirtieth of August anno 20. Eliz, habendum à die datus, and letter of Attorny made the first of September anno 20. Eliz. to make livery, and livery is made accordingly, be a good Lease? because if livery had been made the same day it bear date, and letter of Attorny had been in the same Deed, it had been meerly void. The second question, admitting, 2 Cr. 563. Co. 5. 94 b. Post. 328.

That

That livery by letter of Attorny subsequent be good; whether a Lease being made by a Bishop for three lives, viz. to one for life, remainder to a second for life, remainder to a third for life, so not warranted by the Statute of primo Eliz. cap. 4. and the Successor accepts the rent; Whether this be a good Lease against the Successor himself, who accepted the rent, and shall bind him during his time, so as he cannot enter to avoid it, and make a new Lease? These were the points intended, and were argued at the Barr, but for a fault in the Lease, whereby the Defendant claimed, the matters in Law were not resolved; but Judgment was given for the Plaintiff, without any of the Justices opinions concerning these points; The fault was, That the Bishops there usually by one Lease had let three Manors, reserving 32 l. rent yearly, which was found to be the ancient rent; and the Bishop here makes a Lease habendum to Thomas ap Rees, and his assignes rendring to the Bishop and his Successors the usual and accustomed yearly rent, and the Rents and Services at the days and times usually accustomed, and he doth not shew any rent in certain; and because the ancient rent of 32 l. had been usually paid, where the three Manors were let together, and not expressly reserved upon this Lease; therefore all the Court held, That this Lease under which the defendant claims, is a void Lease by the Statute to bind the Successor, and the Successor having entred and made a good Lease to the Plaintiff, if this Lease to the Defendant be not in esse, it ought to be adjudged for the Plaintiff; But in the argument of this Case at the Barr; For the first point a Case was cited betwixt Greenwood and Tyler in the Kings Bench, Trin. 17. Jacobi rot. 1179. where it was adjudged (and affirmed afterwards in the Exchequer Chamber upon a Writ of Error) That if one makes a Lease for life by Indenture dated vicesimo die Augusti, secundo Edwardi sexti, habendum, from Michaelmas following, for three lives, and livery is made by the Lessor after Michaelmas; It is a good Lease by the Indenture (for it was a Lease by *Baron & Feme* of the land of the *Feme* which ought to inure by the Deed, otherwise it had not been good to bind the *Feme*, for it was adjudged it bound her) So it seemeth a letter of Attorny, being two days after the Deed, is as good as if it had been made in person. And for the second point, another Case was cited to be adjudged in the common-Bench Pasch. quinto Jacobi Rotulo milesimo quadragesimo betwixt Wheeler and Danby, upon an especial Verdict in an Ejectione firmæ, for an acre of land in Mayesmore in the County of Gloucester, That whereas Richard Bishop of Gloucester was seised in fee of the Manor of Mayesmore, whereof this acre is parcel, and by Indenture octavo Elizabethæ Reginæ, demised that acre to Jasper Danby and William Danby, habendum, to the said Jasper, a die datus Indenturæ for his life, remainder to the said William Danby for his life rendring three

Co. Litt. 44. b. Lib. 6. f. 37. a.

2 Cr. 173. Co. Litt. 45. b.

2 Cr. 563.

2 Cr. 563.

Post. 165.

1 Ro. 476. Mo. 318. 9.

thrée ſhillings two pence by the year, at Michaelmas and the Annunciation, and that the ſaid Richard Biſhop of Gloceſter dyed, and Godfry late Biſhop of Gloceſter was created Biſhop, and having notice that divers Rents of the ſaid Manor were due and unpaid, commanded J. W. his Bailiff of the ſaid Manor to receive the ſaid Rents arèr, who accordingly received them, whereof the Rent of the ſaid William Danby was amongſt others paid to the ſaid Godfry, not giving notice particulary to the ſaid Biſhop, That the ſaid Rent received of the ſaid William Danby was the Rent of the ſaid William, & that the ſaid Biſhop generally anno quadrageſimo tertio Regin. Eliz. accepted of all the ſaid Rents by the hand of his Bayliff, and found the Statute of primo Elizabethæ, and that the ſaid Godfry Biſhop of Gloceſter, primo die Aprilis quadrageſimo quarto Elizabethæ, demiſed to the ſaid Plaintiff the ſaid Acre & all Tyths growing thereupon for one & twenty years and that the Plaintiff entred & was poſſeſſed untill the Defendant William Danby ejectd him; and upon this Verdict Judgment was for the Defendant, and it was alledged at the Barr, That it was reſolved hereupon, That although the Leaſe be for life habendum a die datus, yet being found quod Epiſcopus dimiſit, it ſhall be intended, That livery was made after the day, and then it was a good Leaſe. Secondly, this acceptance of the rent by the Biſhops Succeſſor, ſhall bind him for his time, ſo as he ſhall not avoid that Leaſe which was otherwiſe voidable, becauſe it is a Leaſe of parcell of the Demeſns, and for two lives, the one after the other in remainder: And the Copy of this Record was brought me, whereby I ſaw Judgment was given upon this Verdict for the Defendant, but quære whether it were for this cauſe alledged, or for that the Plaintiffs Leaſe was not warranted by the Statute of primo Elizabethæ.

2 Cr. 173 Court
v. That. makes void
ayor void & voidable ne
L. C. Li. 45. D. Accord.

22. NOte a common recovery in a Writ of Entry againſt J. S. for the Manor of D. in the County of Buckingham, was endeavoured to be drawn, and ſuffered at the Barr, wherein the Tenant prayed aid of the King, by reaſon of a warranty in the King whereby he warranted that land, and granted to make recompence upon Eviction, and this *ayd preyer* was to be inſtead of a *Voucher*. The warranty being created by fine and recovery drawn in paper, wherein the Tenant vouched the King, and Sir Robert Heath the Kings Attorny (by a Warrant as he ſaid from the King) entred into the warranty, and prayed, That the demandant might count, and ſo it was drawn, That the Demandant petit verſus Dominum Regem, That land (as the uſual manner of the Courts in common recovery is) and that the Attorny of the King voucheth over the *common vouchee*; but this being peruſed by the Court, although the Attorny ſaid he had warrant for ſo doing, yet becauſe ſuch a courſe hath not been ſeen, nor any preſident ſhewn, That ever any ſhould count againſt the King as *Vouchee*; and this Courſe is

now

now devised to bar a remainder expectant upon an Estate tail in the King (as a Fine by the King is sufficient to bar an Estate tayl in him) and although it is used to be levied by the King, yet that is done by way of render, and not by an immediate Writ of Covenant, therefore the Court would not suffer this recovery to pass, for the King shall never render in value upon *Voucher*, but in such case they ought to sue to the King by petition to have in value, and not by way of *Voucher*. Vid. 9. Hen. 6. 3. & 56. 25. Ed. 3. 39. 39. Ed. 3. 11. Pl. Com. 553.

Smith *versus* the Executors of Poyndreill.

PRohibition was granted upon the Statute of vicesimo tertio Henrici octavi, capite nono, for suing for a Legacy of ten pounds in the prerogative Court, whereas the parties dwell in another Diocess, but because the Will was proved in the spiritual Court, and the Suit in the same Court where the probate was, and there Sentence given for the Legacy; and afterwards an Appeal upon this Sentence to the Delegates, where it was affirmed, and Costs taxed, and Excommunication upon the Sentence; and in all this time untill after the Sentence in the Appeal, not any endeavour made to stay these Suits by the said Statute; therefore having so long allowed the Jurisdiction of the said Courts, he came now too late to have a Prohibition, and although a Prohibition was before granted, because the party had not notice to contradict it, yet the Court would not compell the party to appear and plead thereto (as is the usual Course in such cases) but, upon motion, granted a Consultation. 23. 2 Cr. 321. 2 Cr. 321. Post. 162. 339. R 220. 2 Cr. 429. & 483.

Sir Randolph Crew *versus* George Vernon

UPon a Petition exhibited by Roger Downs Vice-Chamberlain of Chester to the King, he referred the consideration therof to the Lord Keeper, calling unto him any of the Justices of the Benches, who thereupon called Justice Jones, Baron Denham, Justice Yelverton, and my self. The sole question was, Whether a Commission issuing out of the Court of Chester, betwixt Sir Randolph Crew (late chief-Justice) and George Vernon Esquire (now one of the Barons of the Exchequer) to examine Witnesses in a case depending before the Chamberlain of Chester, which was awarded in Hillary Term anno vicesimo secundo Jacobi, returnable in Easter Term following were well executed, The Commissioners beginning the examination of their Witnesses upon the 28. day of March anno 1625. being Monday (which was the day after the demise of King James) and continued in examination of divers Witnesses on both sides untill Friday following, at which day and not before having notice of the demise of the King, they surceased, and returned all what they had done; and upon a motion to the said Court 24. 3 Cr. 12.

for the ſuppreſſing of thoſe depoſitions, as examined without warrant, and before thoſe who had not any authority (as was agréd by all, That by the demiſe of the King, the Commiſſion was legally determined without any notice) yet the ſaid Roger Downs (upon view of preſidents out of the Court of Wards, where ſuch depoſitions taken in that Court remain, within two dayes after the Demiſe of the King, and exception taken for ſtay of publication, yet it was reſolved, That they ſhould ſtand and be publiſhed) and upon a certificate from the ſix-Clerks in the Chancery, That they conceived it might well be done, ordered, That for the more legality of the proceeding, a new Commiſſion ſhould iſſue to the ancient and former Commiſſion, That they ſhould examine as many of the Witneſſes as were alive, reading to them the former depoſitions and the interrogatories, and if they affirmed them, then they ſhould ſtand, if otherwiſe, they ſhould be ſuppreſſed, and ſuch depoſitions of thoſe which were dead (if any) ſhould ſtand, and that they ſhould examine any new Witneſſes upon the ſame interrogatories, but not upon others. Hereupon the ſaid George Vernon by petition complaining to the King, accuſed the ſaid Roger Downs of partiality, and that the Juſtices of Aſſiſe joyned with the ſaid Roger Downs in making orders in this cauſe, and thereupon obtained another order under the Kings hand to ſtay the former proceedings; afterwards the ſaid Downs exhibited a petition to the King, ſuggeſting that the former petition was ſcandalous to the Court, and to the Juſtices and himſelf; whereupon this matter was referred to the examination of the Lord Keeper and the Juſtices; and ſo upon the examination of both petitions, and hearing counſel on both parts, the Lord Keeper and all the ſaid Juſtices reſolved, and ſo certified the King, That they conceived this order was juſt, and great reaſon that the depoſitions ſhould ſtand; For although legally the Commiſſion was determined by the Demiſe of the King, yet the commiſſioners not having notice thereof, and having examined concerning the ſame, they held that ſuch Witneſſes were duly ſworn, and ſhould be allowed, eſpecially in a Court of equity, where the proceedings be jure naturali, and not according to the ſtrict courſe of Law: And they further certified, That no inconvenience could enſue upon ſuch proceedings before notice of the Kings demiſe, but if otherwiſe, it would draw in queſtion many Tryals by Verdicts of Niſi prius, and Tryals and Attainders upon Goal-deliveries, whereupon divers have been arraigned and executed ſince the Kings demiſe, and before notice thereof, a multo fortiori they held That the examination of Witneſſes ſhould ſtand; and they further certified, That they approved of the ſaid courſe, That the Witneſſes ſhould be called, and their former examinations and interrogatories tendred to ſuch of them as were alive, and to inquire whether they approved of them, and not to examine them de novo; and of the direction to examine the new Witneſſes upon the ſame interrogatories, and not upon others, for then inconvenience might enſue:

4 Inſt. 278.

And

And lastly they humbly desired, that to rectifie the credit of Mr. Downs, and the proceedings of the Court, his Majesty would be pleased to revoke his order of restraint, and that this certificate now to be made, might be sent into the County of Derby to be read there, and that the proceedings might be according to the former order: Yet for as much as the cause was weighty, That upon the final hearing and determination thereof, the Court might be assisted by the Justices of Assise of the said County, which is without prejudice to the reputation of any of them; and so it was certified accordingly. Upon this conference the Lord Keeper propounded this question unto us. If any Witnesses examined upon such an illegal Commission should be perjured, whether they might be punished by the Statute of quinto Eliz. cap. 9. for that perjury, and we all conceived they might; for being examined before notice of the Kings Demise, what they did was legal, as the Books be in 34. Assis. Pl. 8. 5. Ed. 4. 12. 22. Hen. 6. 29.

Stephens *versus* Potter.

A Case depending before the Lord Keeper, and agreed upon by Counsel on both sides, and set down under their hands, was, That Mr. Tate seised in fee of the Advowson of Worton, by his Deed let that Advowson and divers other Lands for years, to the Lord Zouch and others, for the payment of his debts, and dyed seised of the Inheritance; some of his Lands being holden by Knight-service in capite, and his Son and Heir Zouch Tate, within age, which was found by office, whereupon the King granted the wardship of body and lands to the said Lessees, rendring Rent to the Receiver or his Deputy within forty dayes after the feasts appointed for payment, with a clause to be void for non-payment, The Rent due at Michaelmas anno 20. Jacobi was arear, and in February 20. Jacobi the Rent was paid to the Receiver, and all Rents after duly paid; the Church becomes void during the minority of the Ward, and afterward the King presents to this Church under the great Seal, and under the Seal of the Court of Wards, viz. Potter under the Seal of the Court of Wards, as to a Church which appertained to the King ratione minoris ætatis of the said Ward, who first obtained institution and induction, and afterward Stephens (under the great Seal) who likewise obtained institution and induction, and which of these were Parson was the question? And first it was agreed, That the King may present to any Church which he hath in right of Wardship, either under the great Seal, or under the Seal of the Court of Wards; but a presentation under the Seal of the Court of Wards, if he hath not right to present in right of the Ward, is void, and cannot make an usurpation; because the title to the presentation is void, and so no presentation; and an institution without presentation is void, as it 25.

2 Cr. 248.

Post. 592.

is held in Greens Caſe, Coke 6. Rep. fol. 29. b. and anno octavo Jacobi in the common-Bench where it was reſolved accordingly, That a preſentation may be under any Seal. Secondly, it was agreed, That the Leaſe for years made of the Land and Advowſon under the Seal of the Court of Wards, is not abſolutely void by the non-payment of the Rent, reſerved upon the ſaid Leaſe for years, without office, becauſe the Rent was payable to the Receiver or his Deputy, which is matter of fact in *pais*; for there is a difference betwixt a Leaſe for years, reſerving rent payable at the Receipt of the Exchequer, with ſuch proviſoes, ut ſupra, and when it is payable to the Receiver or his Deputy: For in the firſt caſe, The payment or non-payment appears by Record; and therefore to prove the non-payment there needs no office. But in the laſt caſe, The payment is to be made to the Receiver or his Deputy, and that appears not of Record, and therefore the Leaſe not void by the non-payment without office: And ſo it was ſaid was the reſolution in the Caſe of Sir Moyle Finch and Throgmorton. The third Objection was, Admitting the Leaſe made of the Wardſhip to be void for non-payment of the rent without office found, yet, becauſe the King hath but a third part of this Advowſon by the Wardſhip, upon the Statute of triceſimo ſecundo Henrici octavi, againſt Leaſes made for payment of debts, and hath title to preſent to the other two parts by his prerogative, which ought to be under the great Seal, (for that ſhall have the pre-eminence to be preferred in grants) under which of theſe Seals it ought to have been made? The fourth objection was, That foraſmuch as the preſentation under the great Seal, and the preſentation under the Seal of the Court of Wards, were both the ſame day; And the preſentation under the Seal of the Court of Wards doth not mention the firſt preſentation, and revoke it, whether it ſhall be good? But to theſe two laſt points no opinion was delivered, becauſe the Lord Keeper conceived, for the laſt reaſon, That the preſentation under the Seal of the Court of Wards was void; And he eſtabliſhed the poſſeſſion with Stephens, the Preſentee of the King, under the great Seal.

Poſt. 173. Co. 5. 56. b. 3 Cr. 221. Mo. 295. 6.

P. C. 129. b.

3 Cr. 221.

Termino Hillarii, anno tertio *Caroli* Regis, in Communi Banco.

Sir Edward Peto *versus* Pemberton. Mich. 3. Car. rot.

IN Replevin the Defendant made conusance as Baliff to Humphry Peto, because that Humphry Peto his Father had granted a Rent-charge of six pounds thirteen shillings four pence unto him for his life, and for forty six pounds Rent arrear at the Annunciation primo Jacobi, he distrained, and averred the life of the Grantee: The Plaintiff confesseth this grant, but that afterward this land so charged, descended to the said Edward Peto, who let it to the said Humphry Peto for five hundred years, primo Aprilis, decimo Jacobi; And that the said Humphry Peto entred by virtue of the said Lease for years, and was possest, Et hoc, &c. The Defendant rejoyns, That after this Lease, and before any part of the Rent was arrear, viz. decimo sexto Decembris, decimo sexto Jacobi, he surrendred dimissionem prædictam of the said lands to the said Edward Peto, qui ad tunc & ibid. thereto agreed, & hoc, &c. and hereupon the Plaintiff demurred, First, is was objected that the pleaging of the surrender dimissionis prædictæ, and not of the Tenements, or of all his Estate therein, was not good, sed non allocatur, for the surrender of the Lease implies all his Estate and Interest, and so it is intended; and although the usual course is to plead surrender of the Estate, yet it is all one, and so much is implyed. Secondly, it was objected, That although he hath pleaded a surrender, and that the Lessor agreed thereto, yet because it is not pleaded, that the Lessor entred, the Rent which was suspended remains yet suspended, untill the Lessor enters or waive the possession, Sed non allocatur; For when he pleaded, That the Lessor agreed to the surrender, it shall be intended that he entred; and it is not usual to plead a re-entry upon a surrender, no more than when a feoffment is pleaded, to plead livery, and seisin thereof, because it is to be admitted. Thirdly, for the matter in Law, When the Grantee of a Rent for life, accepts of a Lease for years of part of the same land, and surrenders the said Lease, whether the Rent remains suspended during the years, or be revived presently by the surrender; Brampston Serjeant much urged, That it is determined during the term for years; For if he had granted this Lease over, it had passed the Rent inclusively: So in this case where the Lessee surrenders, it is quasi a Grant unto him of the Term, and therefore the Rent shall not be revived; but he agreed, if the Lease had

1. Hetl. 50. 71. Hutt. 94.

Co. 4. 82. b. Co. 8. 82. b. Post. 162. C. Litt. 93.

Ant. 83.

had been to the Grantée of the Rent upon condition, and the Lessor had entred for the condition broken, or had recovered in waste, the Rent had been revived, for the Lease is absolutely determined, vicesimo primo Henrici septimi, folio septimo; decimo nono Henrici sexti, folio quarto, & quadragesimo quinto; septimo Henrici sexti, folio secundo; but here the Lessor is in by the Lessée, quasi by his own act; & therefore it shall not be revived: But all the Court held That the Rent was revived; for by the surrender and agreement of the parties, the Lease is absolutely determined and not in Esse, and none of them can say that it is in Esse; but a stranger who is to have benefit thereby may well say, that it is in Esse as to him; but quoad the Lessor and Lessée, it is determined, and the possession and interest is in him without entry; Wherefore it was adjudged for the Avowant.

Co. 8. 145. b. Co. Litt. 338.

Standford *versus* Cooper, Hill. 2. Car. rot. 2674.

2. Her. 72. Hutt. 95.

SCire facias upon a Judgment in Debt, in Termino Hillarii vicesimo secundo Jacobi against one Bill, the Defendant being returned *Terr-tenant*, pleads a Statute acknowledgeth by the said Bill, vicesimo secundo Januarii, anno vicesimo secundo Jacobi, & an Extent by virtue of the said Statute; And if this Judgment shall relate to the first day of Hillary Term, which was the twentieth of January, being the Essoyn day, or only to the twenty third of January, which was quarto die post, was the question; for if it related to the 20. of January, being the Essoyn day, it is precedent to the Statute, and all the Court agréed, That the Judgement shall have relation to the Essoyn day, for in law it is the first day of the Term, and all legal Acts have relation thereunto, and the quarto die post is the day of grace, till when for divers purposes no party shall be prejudiced for not appearing, but as to common intendment it hath relation to the Essoyn day, wherefore being upon a Demurrer it was adjudged accordingly for the Plaintiff, Vid. Dy. 200. & 361. tricesimo quarto Henrici sexti, folio vicesimo; vicesimo secundo Henrici sexti, folio septimo.

Biggot *versus* Smyth, in the Exchequer Chamber.

1 Vent. 188.

UPon an especial Verdict, in the Exchequer, was this Case tryed. A man seized of Lands in Fée, conveys it by feoffment to the use of himself, and wife, and to the Heirs of the survivor of them. The Husband afterwards makes a feoffment of this land, and dies, the Wife enters, and dies; The question was, Whether by the Wives entry the Fée shall vest in her surviving, so as her Heirs shall enjoy it; And it was adjudged that this feoffment of the Husband hath destroyed this future contingent use of the Fée; for whatsoever cannot accrue at the time of the death of the party who first dyeth, cannot afterwards, by any act, be revived, but

Co. 1. 134. b. R. 697. 738.

but is absolutely extinguished. And a Writ of Error being brought in the Exchequer Chamber before the Lord Keeper and Lord Treasurer of England, being both of them Lawyers, and before the two chief-Justices Hide and Richardson, and before Walter chief-Baron, this Judgment was this Term affirmed, as the said chief-Barron related unto me.

Sir Thomas Holt *versus* Sambach, Trin. 2. Car. rot. 731.

REplevin upon demurrer. The case was, Sir William Catesby Tenant for life of the Manor of Lopworth, remainder to Robert his Son and Heir apparent, and to the Heirs Males of his body, remainder to Sir William Catesby and to the Heirs Males of his body, remainder to the Heirs of the body of the said Robert, remainder to the right Heirs of the said Sir William Catesby; The said Sir William Catesby and Robert (being within age) joyn in a Deed, whereby the said Sir Williams Catesby grants, and the said Robert confirms to the said Avowant and his Heirs an annual Rent of ten pounds by the year, payable out of the said Manor of Lopworth, to the said Defendant and his Heirs at two feasts, viz. at the Annunciation, and St. Michael, with clause of distress, and nomine pœnæ of twenty shillings for every Month. Sir William Catesby and Robert joyn in a Fine of the said Manor, to the use of the said William and his Heirs, who infeoffeth the Plaintiff and dyeth, Robert hath Issue yet living, the Defendant avows for twenty shillings parcel of five pounds due at Michaelmas, anno secundo Jacobi, and because two hundred pounds were due pro nomine pœnæ for two hundred Months, he avows for fifty pounds of this nomine pœnæ: The Defendant sets forth all this matter by way of Avowry, except the Monage and Feoffment to the Plaintiff; and the Plaintiff in bar of the Avowry, shews the Monage of him who confirmed and pleaded the feoffment and averment of the life of the Issue in tayl. Upon this barr to the Avowry, it was demurred and argued at the Barr, and the sole question was, Whether this debt be chargable upon the Feoffee? because it was granted by Tenant for life, and confirmed by him in the remainder in tayl, being within age at the time of the Grant; for it was agreed, if a rent be granted by Tenant for life, and confirmed by him in remainder in tayl whithin age, That it is issuing out of the Estate for life only; & meerly a void Grant as to to the remainder; and if the Tenant for life purchase the remainder or reversion and dies, it shall not bind the Inheritance; And although he had made a Feoffment over, his Feoffee, after his death, should avoid it; but here, because he that made the Grant is not only Tenant for life, but hath a remainder it tayl, and after that a remainder in fee, the rent is issuing out of all his Estates; And although it was void, as against Robert the Son who was next in remainder in tayl, who confirmed it, yet for as much as this Estate tayl is barred by the Fine, and

4. Hetl. 74. Hutt. 96.

2 Cr. 428.

Co. lib. 1. 62. a

and the limitation thereof to the use of him and his Heirs who granted the Rent, and the Plaintiff being in, as Feoffee to him, the Court inclined in opinion for the Avowants right to the Rent; for the Estate tayl being barred, that privilege shall not extend to the Feoffee, for he comes in under all the Estates of the Feoffor, who granted the Rent-charge, and therefore shall hold it charged; but because the Avowry was for twenty shillings parcel of five pounds, & the fifty pounds was parcel of the two hundred pounds penalty, and he did not shew, that the residue of the penalty was discharged, therefore it was held, That the Avowry was ill, according to vicesimo Edvardi quarti, folio secundo; quadragesimo octavo Edvardi tertii, folio tertio, and so without regard to the matter in Law it was adjudged for the Plaintiff, upon the insufficiency of the Avowry.

Dier 65.
Post. 137. 436.

Sir Simon Bennets Case.

5.
Post. 371.
Hob. 129.
2 Cr. 482.

DEbt upon an obligation. The defendant in abatement of the Writ, pleaded that the Plaintiff *puis darrain continuance* was made a Baronet, and it was thereupon doubted whether the Writ should abate, for that the Statute of anno primo Edvardi sexti capite. 7. recites the dignities of Dukes, Earls, Vicounts, Barons, Justices of both Benches, and Serjeants at Law, but mentions not Baronets, whereby it seemeth it was not a dignity known at the making of that Statute, but if it were a dignity then known and omitted out of the said Statute, the Court then held it to be out of the Statute; but it was then doubted by the Court whether, if it were a dignity created after the Statute, the said Statute should in equity extend thereunto; and the Court directed, That the Plaintiff should demurr thereunto, and upon argument it should be resolved; but in regard it was only in abatement of the Writ, and it would be but a *Respondes ouster* though adjudged for the Plaintiff, the Plaintiff thereupon offered to bring a new original and the Defendant consented to appear gratis thereto, and plead in Barr; and so these doubts were left undetermined.

The Lady Chichesley against Thomson and the Bishop of Ely, Pasch. 2. Car. rot. 302.

6.
Het. 17.
Hutt. 96.

QUare impedit to present to the Church of Wimple, and counts, That Sir Thomas Chicheley was seised in fee of the Advowson of the Church of Wimple, as of an Advowson in gross, and presented Marshall, and dyed seised, which descended to Sir Thomas Chicheley the Husband of the Plaintiff, who upon the twentieth day of March anno octavo Jacobi, by indenture granted it to Thomas East, and to another in fee, to the use of the Plaintiff for her Joynture, and after to the use of himself in tayl, and afterwards dyed seised, the Church becomes void by the death of Marshall,

Marſhall, wherefore it belonged to her to preſent: The Biſhop dies, pendant the Writ, and the Defendant pleaded thereto, That he is Parſona imparſonata of the ſaid Church ex preſentatione Regis, and ſhews, That Sir Thomas Chicheſly, the Plaintiffs Husband died ſeiſed in fee of the Advowſon of Wimple, as of an Advowſon in groſs, and of the Manor of Preſton in the County of Cambridge, holden of the King by Knight-ſervice in capite, and they deſcended to Thomas Chicheſley, Son and Heir, being of the age of two years; and that an office was found before the Eſcheator of that County by a Writ of diem clauſit extremum, whereby this tenure and diſcent were found, whereupon the King was ſeiſed, and preſented the Defendant, who was inſtituted and inducted abſque hoc, That the ſaid Thomas Chicheſly granted the ſaid Advowſon to Thomas Eaſt, and the other prout, &c. The Plaintiff ſaid, quod non habetur aliquod tale recordum de inquiſitione, and it was thereupon demurred. The firſt exception was taken to the Barr, becauſe he ſaith that he is Parſona Imparſonata, and doth not ſay, tempore impetrationis brevis. Sed non allocatur; for it is inferred by the Writ brought againſt him: and if he be *parſon Imparſonee* before the Plea pleaded, it ſufficeth, and divers preſidents were cited in the new books of Entries, fol. 494, 405, 407, to that purpoſe. Secondly, it was argued at the Barr, That this replication of traverſing the Enquiſition is not good, for there never ſhall be a Travers upon a Travers, but where the Travers in the Barr takes from the Plaintiff the liberty of his Action, for the place or time or ſuch like, there the Plaintiff may maintain his Action for the place or time, and may travers the Inducement to the Travers, and needs not to joyn with the Defendant in the Travers, but at his pleaſure may do the one or the other; but when the Inducement is made and concluded with a Travers of a Title ſhewn by the Plaintiff, there the Plaintiff is enforced to maintain his Title, and not to travers the Inducement to the travers, Vid. 10. Ed. 4. 3. & 49. 12. Ed. 46. 2. Ric. 3. Title Iſſue 121. Dyer 107. and of this opinion was the whole Court. Thirdly, it was reſolved, That for as much as two Titles are compriſed in the Barr for the King, viz. the dying ſeiſed, the Heir within age, and the tenure in Chivalry, whereby the Wardſhip is veſted in the King, and a Title to preſent without office, That therefore in the replication they both ought to be anſwered, and it is not ſufficient to travers the Enquiſition; but ſhe alſo ought to have anſwered to the Tenure, and to the deſcent alledged of the Manor, if the Defendant had relyed upon them; but becauſe the Defendant did not rely upon them, but made them inducements to the travers of the Grant, which is the Plaintiffs Title, that Title ought to be maintained, and not to travers the Inducements to that Travers; Wherefore for theſe cauſes it was adjudged for the Defendant, Vid. 37. Hen. 6. 6. 24. Ed. 3. 27. 46. Ed. 3. 25. 40. Ed. 3. 11. 9. Hen. 6. 37.

Ant. 61. R 518. Co. Litt. 282. b. Hob. 104.

Hob. 154. Poſt. 173. 586

Johns *verſus* Rowe.

7. Jones 175. NOte, That upon a Commiſſion to Juſtice Jones, Juſtice Whitlock, Juſtice Yelverton, and my ſelf, and to four other Doctors of Law, in an appeal of Adminiſtration committed by Sir Henry Martyn to Anne Row, Neece to Elizabeth Johns late the Wife of Roger Johns; The Husband appealed, pretending that of right it belonged unto him, and not to any of his Wives Kindred; and being divers times debated, as well by common Lawyers, as by Doctors of the Civil Law, it was reſolved by Jones, Whitlock, and Yelverton, That of right, the Adminiſtration ought to be commited to the Husband, & not to any of the Wives Kindred, by the Statute of 31. Ed. 3. cap. 11. as to the moſt faithful friend; for as it belongeth unto the Wife upon the Husbands dying inteſtate, ſo it belongeth more properly unto the Husband upon the Wives dying inteſtate; but they agreed, That the Statute of 21. Hen. 8. doth not extend to compell the Husband to take Adminiſtration, for that is a penal Law, and extends only to the Wife and Kindred, and not by equity to be extended to the Husband; and for their opinion they relyed upon Coke lib. 4. fol. 31. b. Andrew Ognels Caſe, That the Adminiſtration of the goods of the Wife belongeth in right unto the Husband; but I doubted thereof, and was of a contrary opinion: For the ſaid Book doth not give any reaſon, nor ſhew any authority to maintain it, and in reaſon, the Husband is not to have it de jure, but it is in the power of the Ordinary to commit the Adminiſtration unto him, or to the Wives Kindred; for if he ought to have it de jure, he would never ſuffer the Wife to make any Will for the advancement of the Children by another Husband, or for her Kindred; and the Wife without the Husbands aſſent cannot make a Teſtament, but by his aſſent ſhe may make him Executor for things in Action, as debts, or *des biens aſport* before the Coverture; ſo it is his default if ſhe dies inteſtate: Alſo the Wife is to be intended to be advanced by her Husband, and to have by the cuſtome rationabilem partem bonorum; therefore he is not in ſuch degree as his Wife, and he is not de jure to have the Adminiſtration: but the Ordinary may commit it unto him if he pleaſe, or he may refuſe; and no Appeal lies if the Adminiſtration be not committed unto him; For it is meerly at the Ordintries diſcretion; and of this opinion were the Civilans; but afterwards, the ſaid three Juſtices, in my abſence, reſolved for the Plaintiff, Vid. 4. Hen. 6. 31. 12. Hen. 7. 24. Coke. lib. 9. fol. 38. 34. H. 6. 14. 27. H 8. 26. 39. H. 6. 27. 18. Ed. 4. 11.

Co. Litt. 351. a. 1 Rol. 910. Moor. 871.

Co. lib. 4. 51. b.

Sir William Crayford *verſus* Sir Robert Crayford, Executor of William Crayford, Hillar. 2. Car. rot. 2418.

8. COvenant, whereas the Teſtator covenanted with the Plaintiff, That the Manor of Ridgway which he aſſured unto the Plaintiff

tiff upon his marriage, was of the value of three hundred pounds yearly; he saith, that in truth it is but of the yearly value of 250l. The Defendant pleaded, That the said Manor was of the value of 300l. yearly at the time of making the said Indenture, secundum formam & effectum Indenturæ prædictæ, and upon this they were at issue, and the Jury find an especial Verdict, viz. the Indenture verbatim, as the Plaintiff declareth, wherein the Testator covenanted to stand seised of that Manor, in consideration of marriage, to the use of the Plaintiff, and the Heirs of his body, and covenants, That he was seised of the said Manor at the date of the said Indenture, of a lawful Estate in fee, notwithstanding any act done by him or any of his Ancestors; And that no reversion or remainder was in the King or any other; And that the said Manor was then of the annual value of 300l. per annum; And that the Plaintiff and his Heirs shall enjoy according to the limitations, discharged, and saved harmless from all incumbrances made by him or any of his Ancestors: And further they found, That this Manor was but of the value of 260l. per an. at the time of the said Indenture, and no more, and that the Testator had not done any act to impair the said value; And if super totam materiam, &c. So the sole question was, Whether this Covenant for the value depends upon the first part of the Covenant, That notwithstanding any Act made by the Testator or his Ancestors, or if it were an absolute and distinct Covenant of it self? And upon the first argument the Court resolved, That it was an absolute and distinct Covenant, and had no dependance upon the first part of the Covenant, Vide 27. Hen. 8. 29. 7. & 8. Eliz. Dy. 240. R 30. 2 Cr. 644. 3 Cr. 44. Post. 496. Moor. 58.

Sands *versus* Trevilian.

ERror of a Judgment in the Common-Bench in debt, where the Plaintiff sued the Defendant, because he retained him being an Attorny in the Common-Bench, to prosecute such a Suit in that Count betwixt one Simms and Worlich, and designed him to be Attorny for Worlich, & agreed to pay him his fees, and sheweth that he laid out so much in that Suit for Worlich and that the Defendant had not paid him. After Verdict, upon Nil debet pleaded, it was found for the Plaintiff, and Judgement given. The Error assigned was, That an Action of debt lies not; for the Defendant is but a Solicitor, and there is not any consideration. And it is maintenance in him to solicite Suits, 32. Hen. 6. 25. 21. Hen. 6. 16 Secondly, although the Defendant be suable for this retainer, yet it ought to be in an Action upon the Case, in an Assumpsit, and not in Debt; for there is not any contract betwixt them: And concerning this point the Court doubted, and would advise thereof, Et adjurnatur, Vide Bradford and Woodhouses Case, Hillary decimo sexto Jacobi in Banco Regis rot. 416. Vide postea pag. 193. 8. 1 Ro 594. Post. 160. Post. 194. 2 Cr. 521.

Termino Paſchæ, anno quarto *Caroli* Regis, in Communi Banco.

Mynn *verſus* Coughton and his Wife.

ACTION upon the Caſe. Whereas the Plaintiff had recovered a debt of thirty pounds againſt T. D. and did thereupon ſue forth a Capias ad ſatisfaciendum, and delivered it to the Sheriff of the County of Cambridge, who had arreſted and taken him in execution by vertue of the ſaid Writ, That the Defendants had reſcued him out of the ſaid Execution, by means whereof he went at large, and cannot ſince be found, ſo as the Plaintiff is defrauded of his Execution. Upon Verdict found for the Plaintiff, it was moved in arreſt of Judgement, That an Action upon the Caſe lies not againſt the Defendant for this *Reſcous* by the Plaintiff, who recovered; But his remedy is againſt the Sheriff in debt or Action upon the Caſe, and the Sheriff ought to have this Action againſt the Reſcouſſors, for there is not any reaſon the Defendants ſhould be twice puniſhed, as they ſhould if the Plaintiff ſhould maintain this Action againſt them, and Hutton and Yelverton were of that opinion, but Richardſon chief Juſtice, Harvie and my ſelf held, That the Action well lies for the Plaintiff; for he is the party who hath the loſs, and to whom the injury was done, wherefore in reaſon he ought to have the Action, and not be inforced to ſue the Sheriff; for perhaps the Sheriff is dead, and then no Action lies againſt his Executors, wherefore it is juſt that the Plaintiff ſhould take his election; and if he recover, the parties may plead it if they be ſued by the Sheriff, ſo as there is not any danger of being double charged; Wherefore it was adjudged for the Plaintiff. 1. Het. 95. Hutt. 93. 2 Cr. 486. Poſt. 240. Ant. 75.

Iſeham *verſus* Morrice.

EJectione firmæ by the Plaintiff Leſſee of the Earl of Kent againſt the Defendant, Tenant to the Earl of Pembrook. Upon evidence at the Barr, it was held by all the Juſtices, whereas Edward Earl of Salop was Tenant for life of the Manor of Alveton in the County of Stafford, Remainder to Grace Lady Candiſh his Siſter of two parts thereof in three parts to be devided for life, the Remainder of the third part to 2. Het. 81.

to the ſaid Grace and the Heirs Males of her body, the Remaind e over, &c. and ſhe by Indenture inrolled, bargained and ſold to the ſaid Edward all her moity-part and purparty of the ſaid Manor, and Covenants to ſuffer a recovery for further aſſurance, which is had accordingly, and Grace made the Voucher; Firſt, That this was a good recovery of the intire third part, and not of the moity of the third part, as it was ſtrongly urged at the Barr, it ſhould be. Secondly, That if one hath intereſt only in the third part of a Manor, and ſuffers a recovery of the moity of the Manor, it is good for the third part. Thirdly, That where one makes a Leaſe for years of land by Indenture, and hath nothing in the land, and afterward purchaſeth the land and alienes it; although it be a good Leaſe for years by Eſtoppel againſt him and his Alienée by way of pleading, and ſhall bind them; yet it ſhall not bind the Jury, but they may find the truth; and if they find the truth, the Court ſhall adjudge it to be a void Leaſe. Fourthly, That where bargainée by Indenture, after the enſealing of the Indenture and before the inrollment, lets the ſame land for years, and afterwards the Indenture is inrolled within the ſix Months; yet the Leaſe is void, and the relation of the inrollment ſhall not make it good. Fifthly, That where one is Leſſée for years, and aſſigns over his Leaſe in truſt for himſelf, and afterwards purchaſeth the Inheritance, and occupies the land, and then levies a Fine with proclamation, and the Truſtée doth not claim his Leaſe within the five years; this Fine and non-claim ſhall barr the intereſt of the Truſtée, for he who levied the Fine hath the poſſeſſion by reaſon of the Truſt, and this Truſt is included in the Fine, and the Truſtée not making claim, his intereſt is barred thereby. Sixthly, That where one by Indenture, in conſideration of money, bargaineth and ſelleth, demiſeth and granteth land for years, and the next day after by Indenture reciting that grant and demiſe, grants the reverſion to divers uſes, the Leſſée attorns, it is a good grant of the reverſion, although there were not any proof, that the Bargainor entred before this grant of the reverſion, or that the Bargainor waived the poſſeſſion; For the Leſſée ſhall be adjudged in actual poſſeſſion by the Statute of viceſimo ſeptimo Henrici octavi of uſes, and the reverſion is immediately divided from the poſſeſſion, and he hath a good reverſion; but in caſe of a Leaſe for years at the common-Law, untill the Leſſée enters, or the Leſſor waive the poſſeſſion, the reverſion is not divided, nor paſſeth by the words of grant of a reverſion.

Co. 2. 4. b.

R 437.
3. Cr. 140.
Lib. 2. 4 b.
Lib. 4. 53. a.
C. Lit. 227. a. 352.

R 352.
1 Vent. 360. 1. Cont. Poſt. 218.

2 Cro. 52. 53. 2 Vent. 329.

R 230.
352. 6. 431.

Co. 5. 124.

2 Cr. 604.
Poſt. 400.

2 Cr. 604.
Lib. 5. 124. b.
Saffyns caſe.

Eaton *verſus* Ayloff and his Wife

3. Hetl. 94.

PRohibition was prayed, becauſe they ſued in Court-Chriſtian for defamation, and ſpeaking theſe words of the Plaintiff, He was a Cuckold and a Wittal, which is worſe than a Cuckold, and that Ayleſworth had lain with Ayloffs Wife; and for theſe defama-

tory

toꝛy woꝛds he ſued there; and becauſe it was alledged, That foꝛ theſe woꝛds, being but woꝛds of ſpléen, Prohibitions had béen uſually granted, day was thereupon giben untill this Term, to ſhew cauſe why a Prohibition ſhould not be granted, and divers preſidents were ſhewn, That foꝛ calling one Cuckold bꝛ Whoꝛe, Prohibitions have béen granted; But now upon adviſement all the Court agréed, That no Prohibition ſhould be granted, but that the ſpiritual Court ſhould have Juriſdiction thereof: Foꝛ although they held, That there ought not to have béen any Suit foꝛ the firſt woꝛds, they being too general, yet being coupled with a particular, ſhewing that the Wife committed ſuch an offence with ſuch a particular perſon, they be not now general woꝛds of ſpléen in common and uſual diſcourſe and parlance; but they held it was ſuch a defamation as one is ſuable foꝛ in the ſpiritual Court, whereupon the Prohibition was denyed. Brownlow chief Pꝛothonotary pꝛoduced ſeveral pꝛeſidents, where Prohibitions had béen granted to ſtay Suits foꝛ ſuch woꝛds, viz. Trin. decimo quinto Jacobi, rot. 2260. Purcas *verſus* Birrell; Foꝛ that he was pꝛeſented at ſeveral enqueſts within his Pariſh foꝛ being a Dꝛunkard and a Barretoꝛ. And Paſch. ſexto Jacobi rot. 397. Prohibition to ſtay a Suit foꝛ calling a Parſon Hedg-Prieſt, Mich. viceſimo primo Jacobi. Barker *verſus* Paſmore: She is a Quean and a Tainted Quean, Prohibition granted.

Poſt. 338. R. 770.

Poſt. 285.

Termino

Teomino Trinitatis, anno quarto *Caroli* Regis, in Communi Banco.

Farrington *versus* Keymer.

4. Het. 101. Hutt. 98.

INformation against the Defendant, upon the Statute of vicesimo tertio Henrici octavi, capite quarto, for selling Beer at another price than is thereby appointed, which is, That the Offendor shall forfeit six shillings for every Barrel, &c. the one moity to the King, the other to the party, who will sue in any of the Kings Courts by action of Debt, &c. After Verdict at Norfolk Assises upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgment, That this Information was not maintainable in this Court, for the Statute of vicesimo primo Jacobi, capite quarto, appoints, That Informations shall be before the Justices of peace for such matters whereof they have power to inquire, and not in the Courts at Westminster; and so the Statute being in the negative, the Information is not here allowable; but all the Justices resolved (absente Harvey) That this Information was well brought in this Court. For the first, it was held, That the

R. 748. Statute of vicesimo tertio Henrici octavi, which gives the forfeiture to be recovered in Courts, where no protection, Essoyn, &c. is allowable, extends only to the Courts at Westminster, and not to any

Post. 146. Moor 421. other inferiour Court, although Westminster be not named; For an inferiour Court cannot allow protections, or *gager de ley*, and therefore it cannot be sued before the Justices of peace, or *Oyer* and *Terminer*, as in Gregories Case, Coke lib. 6. fol. 19. & Dy. 236. Secondly, it was resolved, That the Statute of vicesimo primo Ja-

3 Inst. 193. 4 Inst. 172. cobi makes not any new Law to inable the Justices of peace to meddle with Informations, which were not before appointed by the Statutes to be inquired of before them, and to be sued by Informations, but only appoints, That where Informations may be brought before them, or in the Courts of Westminster at their election; there they shall be brought in the Sessions before the Justices of the peace, or of *Oyer* and *Terminer* in the Counties where the offence was committed, and that for the ease of the Subjects, who be Defendants. Thirdly, they all said, that the principal doubt in this Case was, whether the Statute of tricesimo tertio Henrici octavi, capite decimo (which appoints that Justices of peace may inquire among other Statutes, of and upon the Statutes of victuals, Victualers, Inholders, &c.) extends to give them authority to receive Informations upon

upon the Statute of viceſimo tertio Henrici capite quarto: and if Brewers ſhall be ſaid Victualers within this Statute? And it was reſolved, That they ſhould not; for this Statute of viceſimo tertio Henrici octavi is not properly againſt Brewers, who are but obliquely puniſhed within that Statute, and the words Victuals and Victuallers are properly to be applyed and extended againſt the Ale-houſe-keepers, who ſell by retail and keep not the Aſſiſe, and who by the perview of the Statutes were inquirable before Juſtices of peace, as the Statutes of 23. Ed. 3. cap. 6. and of 12. Ric. 2. and other expreſs Statutes are; but Juſtices of peace, and *Oyer* and *Terminer* are not to enquire concerning this Statute, which is ſuable in the Courts of Weſtminſter only; Wherefore for this cauſe it was adjudged for the Plaintiff.

Norton *verſus* Fermer.

PRohibition was granted to ſtay a Suit for tythe of wood, upon ſurmiſe that the wood was ſpent in his houſe for firing, and ſhews that the cuſtome in the ſame Pariſh is, That the Owners of any houſe and land in the ſaid Pariſh is, who pay tythes to the Parſon, ought not to pay tythes of wood ſpent for fewell in their houſes; and Iſſue being upon this cuſtome; it was found for the Defendant, and moved in arreſt of Judgment, That although it be found there be no ſuch cuſtome, yet he ought not to pay tythes for wood ſpent in his houſe, nor for fencing ſtuff for hedges, but per legem terræ ought to be diſcharged of them; but the Court reſolved, That it is not de jure per legem terræ that any be diſcharged of them; for it is uſual in Prohibitions to alledge cuſtoms, as for Yarth-penny, or by reaſon of other lands whereof he pays tythes, That he is diſcharged of that tythe, but not to alledge, That per legem terræ he is diſcharged, and the Plaintiff here having alledged a cuſtome, and being found againſt him, it was adjudged for the Defendant, That conſultation ſhould be granted. 5. Het. 110. Moor. 917. 3 Cr. 603. Mo. 909. 3 Cr. 609. Mo. 910. 1 Vent. 75. 236. Poſt. 166. 2 Cr. 576.

Iſabel Peels Caſe.

PRohibition was prayed by her againſt the Eccleſiaſtical Commiſſioners, for that it was by Articles in that Court objected againſt her, That ſhe was aiding and aſſiſtant to Sir H. in the years 1622. 1623. untill September 1624. to have familiar acquaintance with the Viſcounteſſe Purbeck, with whom he committed adultery, and that ſhe was chief Agent for their meetings at unſeaſonable times, by and through her private Lodgings and paſſages, by means whereof they took their opportunities to commit adultery, for which offence ſhe was by the ſaid Commiſſioners upon the ſeventh day of February anno Domini 1627. ſentenced to be guilty of Bawdry and Lenocynie, and fined two hundred pounds to the Kings uſe, and injoyned to make ſuch a penitential 6. Het. 107.

acknowledgement in the Savoy Church as the ſaid Commiſſioners ſhould appoint, and to be impriſoned untill ſhe found Sureties for the perfoꝛmance of all this Sentence; and for this cauſe ſhe prayed a Prohibition; For that by the general Pardon in anno viceſimo primo Jacobi ſhe was pardoned for theſe offences committed in the years 1622. 1623. unto September 1624. and ſhe averres, that ſhe is not guilty of any offence ſince that time, whereupon the Court granted a Prohibition; for although the time after the Pardon is mentioned in the Sentence, yet it was for offences be-
Ant. 47. fore the Pardon, and ſo it ſtands well with the Sentence, and the averment makes it material: admitting alſo that part of the offences were committed after the time mentioned in the Pardon, yet the Fine being intire, and both the time before and after the Pardon involved together, Juſtice Hutton conceived that a Prohibition ought to be granted; and for this reaſon alſo, becauſe ſhe is ſentenced to be impriſoned untill ſhe find Sureties to perform
4 Inſt. 331. the whole order, which is not warrantable: For although by the Statute of primo Elizabethæ Reginæ, capite primo, the high Commiſſioners may aſſeſs Fines, or award impriſonment for an offence, yet they can neither commit any to priſon for the Fine, nor untill the parties find Sureties for the perfoꝛmance of their oꝛders; but they ought to certifie the Fine into the Exchequer, &c. And Hutton further ſaid, it had been ruled in this Court, that
4 Inſt. 331. * 4 Inſt. 333. Suits for * Adultery (unleſs ſuch only as were exoꝛbitant and notoꝛious) ought to be bꝛought before the Oꝛdinary in his ſpiritual Court; neither doth a Suit for Alimony in the high Commiſſion
Poſt. 220. 582. Court lie, for the Commiſſion is grounded upon the Statute; and if they get Commiſſions of and for other Offences, then the Statute appoints, they have no ſufficient ground for their proceedings, and ſeveral caſes were cited to that purpoſe, viz. Paſch.
2 Brownl. 37. octavo Jacobi Regis, Doctor Conwards Caſe, who being ſued before
4 Inſt. 333. the high-Commiſſioners for his wives adultery, and for being Pandoꝛ unto her, a Prohibition was granted; And Condies Caſe of Canterbury, who being ſued before the high-Commiſſioners upon the election of a Clerk, a Prohibition was granted, becauſe they have not any Juriſdiction for ſuch matters: And one Balams Caſe, Suit being before them for Battery, a Prohibition was
9 Inſt. 333. granted, for it is no ſuch offence which the Statute intends to be there ſuable; whereupon in the principal Caſe a Prohibition was granted after divers dayes debating, and chiefly upon the Pardon, becauſe it was not any of the offences excepted therein. Note alſo, that Elizabeth Aſh had a Prohibition upon the ſame Surmiſe, being joyned in the ſame Sentence.

Denns

Denns Case.

THe case was thus, Thomas Denn being seised of certain lands in fee, and possessed of divers goods, devised the same for the payment of his debts and legacies, and they being paid, the residue and surplus thereof, to his Wife, who he made his sole Executrix, and dyed, and his Wife, surviving him, also dyed before probate or any election, The Brothers and Sisters of the woman laboured to get Administration cum testamento annexo, The Plaintiff who was Brother and Heir to Thomas Denn, suggesting that the Will was revoked, and that however the spiritual Court had no conusance of the probate of Wills concerning lands, they not being testamentary, prayed a prohibition, which was granted, for when the question is, whether a Will made of Lands & Goods be revoked, it is properley tryable at the common-Law, but if the question be, whether a Will of Goods only be revoked, it is properly tryable in the spiritual Court; for they having conusance of the principal matter, shall try also the Accessories; and it was said at the Barr, That they in the spiritual Court will deny the plea of the revocation of a Will, or at least wise, will inforce to prove it by such Witnesses, as are not to be excepted against in their Law, as Servants, or Kindred, or Legatories, and yet those Witnesses are allowable at the common-Law; and being prayed that the prohibition might be granted to extend only quoad the lands, it was denyed and was granted generally for both; for when it is one intire Will of Lands and Goods, and the allegation is to revoke it intirely, it shall not be dis-joyned in the Prohibition; but if one make several Wills, one of his Land, another of his Goods, and revocation is alledged of both, there a Prohibition shall be granted for the one, and denyed for the other.

7. Hetl. 113. Jones. 225. R. 111. Ant. 94. Lib. 6. 23. b. 2 Cr. 346. Post. 166. 396.

Brown *versus* Hancock.

ASsumpsit. After verdict for the Plaintiff, it was moved in arrest of Judgment, That the promise is alledged to be made beyond the time limited in the Statute of 21. Jacobi, and the Action is not brought within the time limited thereby; and all the Court held, if it appears so by the Plaintiffs own shewing, That the Action is not brought within the time limited by the Statute, the Plaintiff cannot maintain his Action, but Judgment shall be given against him; or if the contract in the Assumpsit or Debt be alledged to be within the time limited by the Statute; and upon non debet or non Assumpsit pleaded, it appears upon the evidence, That the Assumpsit or Contract was beyond the time limited, the Action lyes not, and the Defendant shall take advantage thereof, if it be specially found by the Jury, for the Statute is in the negative, That he shall not

8. Hetl. 111. Post. 139.

maintain ſuch an action but within the time limited by the Statute; But in the principal Caſe it appeared upon the view of the Record, that the Action was brought within the time limited; And therefore it was adjudged for the Plaintiff.

Homes *verſus* Savill.

9. Hetl. 106. 113. ASſumpſit. Whereas divers reckonings and accompts were betwéen the Plaintiff and Defendant, and at ſuch a day, year, and place, they inſimul computaverunt for all Debts, Reckonings and Demands, and the Defendant upon the ſaid accompt was found to be the ſumm of 20 l. in arrear unto the Plaintiff, in conſideration whereof he promiſed to pay unto the Plaintiff the ſaid Debt, &c. That the Defendant licet ſæpius requiſitus had not paid, per quod actio ei accrevit, &c. The Defendant pleaded non Aſſumpſit, and it was found againſt him; and it was moved in arreſt of judgment, That this Action is not maintainable; for he ought to have ſpecified the particular matter and cauſes, viz. pro Mercimoniis venditis, or otherwiſe, wherefore he ſhould have an accompt, otherwiſe it lies not; But the whole Court delivered their opinions to the contrary, That for as much as the accompt may Ant. 6. 31. be for divers cauſes, and ſeveral matters and things may be in- 2 Cr. 207. 69. cluded and compriſed therein, which in pede compoti is reduced to a ſumm certain, wherein it certainly appears he remains and Hob. 88. ſtands indebted; it is a ſufficient ground to maintain the Action, without expreſſing the particulars for which they accompted, for proof whereof divers preſidents were produced where ſuch Actions brought have béen adjudged good; Whereupon Judgment was given for the Plaintiff.

Taylor *verſus* Page.

10. Hetl. 114. ACcompt. Upon receit of divers ſumms, the Defendant pleaded *nunques ſon Receivor*, and found againſt him; And, being adjudged to Account before Auditors, he pleaded, That after the receit, and before the Action brought, he had put himſelf in arbitriment for all Treſpaſſes, Debts, Accounts and Actions, &c. who arbitrated, That he ſhould pay 10 l. only in diſcharge of all Treſpaſſes, Debts, Accounts and Actions, which he paid accordingly, whereupon it was demurred, and without argument adjudged for the Plaintiff; For this arbitriment before the Action ought to have béen pleaded in barr of the Action, which being omitted, he hath loſt the advantage thereof, and ſhall never plead it before the Auditors; Whereupon it was adjudged for the Plaintiff. Vid. 22. Hen. 6. 55. 1. Ed. 5. 2. 21. Hen. 7. 31.

Poſt

Poſt Terminum Trinitatis, anno quarto *Caroli* Regis

Hugh Pine Eſq; his Caſe.

ONe *William Collier*, attending the ſaid Mr. *Pine* at his houſe in the Country, was demanded of him, Whether he had ſeen the King at Hinton, or no? whereunto *Collier* anſwered, That he had ſeen the King there. Mr. *Pine* thereto replyed, Then haſt thou ſeen as unwiſe a King as ever was, and ſo governed as never King was; For he is carryed as a man would carry a child with an Apple: Therefore I, and divers more, did refuſe to do our duties unto him. After which words ſpoken, the ſaid *William Collier*, meeting with *Richard Collier* his brother, asked him Whether the King were not a wiſe King? who anſwered, Yes, He was a wiſe and temperate King. After which, at another time, *Mounſier Sabiza* being at Mr. *Pawletts* houſe at *Hinton*, Mr. *Pine* asked *Collier*, Whether the King was there or no? who anſwered, That he heard he was: whereunto Mr. *Pine* replyed, That he could have had him at his houſe, if he would, as well as Mr. Pawlett. At another time one *George Morley*, a Lock-ſmith, being at Mr. *Pines* houſe, he asked him, What news? whereunto he anſwered, That he heard the King was at Mr. Pawletts at Hinton: Then Mr. *Pine* ſaid, That is nothing; For I might have had him at my houſe, as well as Mr. Pawlett; for he is to be carryed any whither: And then Mr. *Pine* ſaid aloud, Before God, he is no more fit to be King than Hickwright. This *Hickwright* was an old ſimple fellow who was then Mr. *Pines* Shepheard. 11.

Theſe words being thus proved by *Williamm Collier* and *George Morley*, all the Judges were commanded to aſſemble themſelves, to conſider and reſolve what offence the ſpeaking of thoſe words were: Whereupon Sir *Nicholas Hide*, chief-Juſtice of the Kings-Bench, Sir *Thomas Richardſon*, chief-Juſtice of the Common-Bench, Sir *John Walter*, chief Baron of the Exchequer, Sir *William Jones*, one of the Juſtices of the Kings-Bench, Sir *Henry Telverton*, one of the Juſtices of the Common-Bench, Sir *Thomas Trevor*, and *George Vernon*, Barons of the Exchequer, none other of the Judges being then in Town, met at *Serjeants-Inne* in *Fleet-ſtreet*, where they debated the Caſe amongſt themſelves, in the preſence of Sir *Robert Heath*, the Kings Attorney-General: And divers preſidents were then produced,

Kane.

Kanc. anno viceſimo primo Henrici ſexti. Juliana filia *Willielmi Quick*,& alii falſi proditores incogniti in occulto machinantes mortem Regis,&c.prædicta *Juliana*,ex aſſenſu *Willielmi*,&aliorum proditorum ignotorum, eidem Domino Regi, ut fuit equitans in via adheſit, & dixit eidem Domino Regi, Harry of Windſor, ride ſoberly, Thy horſe may ſtumble and break they neck. And when the noble *John Beuchamp* then ſaid unto her, To whom ſpeakeſt thou; ſhe anſwered, To that proud Boy in red, ryding on horſe-back, pointing with her hand to the ſaid King. And further calling out to the ſaid King, ſaid, It becommeth thee better to ride unto thy Uncle, than that thy Uncle ſhould ride unto thee; Thou wilt kill him, as thou haſt killed thy Mother: Send unto thy Uncle his Wife, whom thou keepeſt from him. Thou art a fool, a known fool throughout the whole Kingdom of England. She had **pain fort & dure*, becauſe ſhe would not plead.

*3. Inſt. 14.

Berk.anno viceſimo ſecundo Henrici ſexti. Thomas Kerver indictatur, pro eo quod ipſe proditorie dixit verba ſequentia. Woe to the Kingdom where a Child is King. Et iterum dixit, It had been better for the Kingdom of England by an hundred thouſand pounds, if the ſaid King had been dead twenty years before. Et iterum, It had been better for the ſaid Kingdom, by an hundred thouſand pound, if the ſaid King never had been born. And, That the Dolphin of France was in Aquitain and Gaſcoyn, with a great power, and valiantly fighting, poſſeſſing himſelf of the Land of the King of England in Aquitain and Gaſcoyn. And if the ſaid King were but of as much humanity as the Dolphin, who is of his age, the ſaid King might quietly and peaceably hold and enjoy his ſaid Lands. To this he pleaded *Not Guilty*, and was committed to the Conſtable of the Tower of *London*; and afterward recommitted unto *Wallingford* Caſtle. Ideo nil ultra apparet.

Suſſex. viceſimo nono Henrici ſexti. Johannes Clipſham indictatur pro eo quod ipſi & alii dixerunt, Quod Dominus Rex non fuit de poteſtate, nec ſcientia, ad Regnum *Angliæ* gubernandum, Et quod noluerunt ulterius obedire Regi, nec gubernationi ſuæ, infra idem Regnum; minanteſque inter ſe veros populos Domini Regis de Comitatu *Kanciæ*, pro eo quod ipſi noluerunt reſiſtere ipſum Regem de Juſtitia ſua infra eundem Comitatum, ac ſimiliter inſurrexerunt, &c.

Suſſ.anno viceſimo nono Henrici ſexti. Johan. Mirfield & Willielmus Mirfeild indictantur, pro eo quod dixerunt, That the King was a natural fool, and would oftentimes hold a ſtaff in his hand, with a bird over the end, playing there with as a fool; And that another King muſt be ordained to rule the Land; ſaying, That the King was not a perſon able to rule the Land. Et ulterius dixerunt, That the

the Charter that the King made at the first Insurrection, was false; And that he and his fellowship would arise again; and when they were up, they would not leave any Gentleman alive but such as they list, &c. Per Indictam. Sessions *Suffex.*

Norff. anno triceſſimo primo Henrici ſexti. Willielmus Bretenham generosus, indictatur pro proditoriis verbis, viz. Quod *Richardus* Dux *Eborum* extra terram *Hiberniæ* infra quindecem dies tunc proxime ſequentes veniret, & Coronam dicti Domini Regis de eodem Rege auferret, & illud ſuper caput ejuſdem Ducis infra brevi poni faceret. Notatur in margine Indictamenta ſic, Treſpas enormia, contempt. & alia offence. Tamen in Indictamento eſt *proditorie loquebatur*, &c.

Suff. anno triceſimo primo Henrici ſexti. Willielmus Aſhton Miles indictatur, pro eo quod ipſe et alii, proditorie diverſas billas et ſcripturas, in rythmis et balladis, factas et fabricatas, ſuper oſtia et feneſtras diverſorum hominum poſuerunt, recitantes in eiſdem, Quod Dominus Rex, per conſilium Ducis *Suffolciæ*, Epiſcopi *Sarum*, Epiſcopi *Ciceſtriæ*, Domini de *Say*, et aliorum de Concilio Domini Regis exiſtent. vendidit Regna *Angliæ* & *Franciæ*; Et quod Rex *Franciæ*, avunculus Regis, regnaret ſuper dictum Regem, dicentes et ſcribentes hæc omnia et ſingula. Et ſimiliter miſerunt literas hominibus de *Kanc.* ad inſurgendum erga Regem, ad adjuvandum Ducem *Eborum*, &c. ad guerram levandum. Per indictamentum *Suff.* anno 31. H. 6.

Eſſex, anno triceſimo quarto Henrici ſexti. Johannes Gayle indictatur, pro eo quod ipſe et alii dixerunt, Quod dictus Rex, et omnes Domini ſui circa perſonam ſuam, et Concilium ſuum, falſi ſunt; Et quod ipſi petitiones ſuas, in ultimo Parliamento dicti Regis, apud *Weſtmonaſterium* tentum, per ipſos et totam Communitatem *Kanciæ* petitionat. &c. Invitis dentibus dicti Regis habere voluerunt: Et quod non licet Epiſcopis dicti Regni ullam poteſtatem, nec aliquam congregationem Populi erga ipſos ad perturbandum de bonis propoſitis ſuis perimplendis, aſſemblare, nec retinere. Quodque Presbyteri totius *Angliæ* nulla bona nec catalla, præter cathedram et candelabrum ad inſpiciendum ſuper libros ſuos haberent et poſſiderent. Ac quod *Johannes Mortimer*, alias *Cade*, eſt vivens; et quod ipſe eſſet eorum capitalis capitaneus in omnibus propoſitis ſuis perimplend. Credentes, et dicentes, Quod ipſi eſſent infra tres dies quinque millia hominum armatorum: Et ſimiliter guerram erga Regem levarent.
Habuerunt chartam allocatoinis eodem Termino.

Wiltſ. anno ſecundo Edvardi quarti. Oliverus Germaine, Taylor et alii falſi proditores, machinantes et proponentes quomodo Regem *Edvardum*, &c. deſtruere potuerunt: Et *Henricum* ſextum, nuper de facto, et non de jure, Regem *Angliæ*, inimicum Regis *Angliæ*, autho-
ritate

riate Parliamenti reputat. & approbat. infra Regnum *Angliæ*, extra Regnum *Scotiæ* reducere. Et Regem *Edvardum* deponere, &c. Mortem Regis compaſſer. &c. Credentes & dicentes inter ſe, in propheſiis, ut falſi Heretici, Quod Dominus *Henricus* nuper Rex, infra breve eſſet eorum Rex in regno *Angliæ* ſicut prius, & Coronam ſuam in eodem regno haberet & retineret, dicentes hæc omnia ea intentione, Quod veri Populi Domini Regis cordialem amorem extraherent.

Judgment to be hanged, drawn, and quartered.

Norff. anno nono Edvardi quarti. Willielmus Belmyn de *Norwico*, Mercer, indictatur, Quod cum *Robertus* de Ryddeſdale, à diuturno tempore proponens ſtatum & dignitatem Regis *Edvardi* quarti, &c. adnihillare, &c. Et ipſum Regem per guerram, &c. de Regali, &c. privare, &c. Inter alias falſas proditiones, &c. diverſos Articulos proditorum, &c. fabricavit, publicavit, & proclamavit. Et quod prædictus *Willielmus* quandam ſcedulam tenorem prædictorum Articulorum continent. apud *N.* &c. Monſtravit & publicavit & eoſdem Articulos pro bonis articulis, & communi utilitate regni expedientes affirmavit, & quamplures perſonos ad ipſos Articulas manutenendum & approbandum excitavit.

Nota, non dicitur *proditorie* in eodem Indictamento.

Anno decimo ſeptimo Edvardi quarti. Juratores preſentant. Quod *Thomas Burdet*, unper de Arrow, in Comitatu *Warwici* Armiger, Deum præ oculis non habens & debitum legianciæ ſuæ minime ponderans ex malitia præcogitata, diabolica inſtigatione ſeductus, viceſimo die Aprilis, anno regni Regis *Edvardi* quarti, poſt Conqueſtum decimo quarto, & per diverſas vices poſtea, apud villam *Weſtmonaſterii*, in Comitatu *Middleſexiæ*, falſo & proditorie, contra legianciæ ſuæ debitum, mortem & deſtructionem ipſius Regis imaginavit, compaſſus fuit & circuivit, ac ipſum Regem falſo & proditorie adtunc & ibidem interficere propoſuit, & ad illud falſum nefandum propoſitum ſuum perimplendum, falſo & proditorie laboravit & procuravit quoſdam *Johanem Stacy*, nuper de *Oxonia*, in Comitatu *Oxon* generoſum, & *Thomam Blake*, nuper de *Oxon* in Comitatu *Oxon* Clericum, apud villam *Weſtmonaſterii* prædictam duodecimo die Novembris tunc proxime ſequent. ad calculandum & laborandum de & circa nativitatem dicti Domini Regis & *Edvardi* filii ſui primogeniti, Principis *Walliæ*, & de morte eorundem Domini Regis ac Principis ad ſciendum quando iidem Rex & *Edvardus* filius ejus morientur. Dictique *Johannes Stacy* & *Thomas Blake*, ſcientes illud falſum & nefandum propoſitum prædicti *Thomæ Burdet*, ipſi *Johannes Stacy* & *Thomas Blake*, dicto duodecimo die Novembris, apud villam *Weſtmonaſterii* prædictam, falſo & proditorie mortem ipſorum Regis & Principis imaginaverunt & compaſſi fuerunt, ac ipſos Regem ac Principem adtunc & ibidem interficere propoſuerunt. Et poſtea, ſexto die Februarii, dicto anno decimo quarto, apud villam *Weſtmonaſterii* prædictam, prædicti *Johannes Stacy* ac *Thomas Blake* eorum falſum & proditorium

ditorium propositum perimplendum, falso & proditorie laboraverunt & calculaverunt per artem Magicam, Nigromanciam, & Astrono- 3 Inst. 6.
miam, in mortem & finalem destructionem ipsorum Regis ac Princi- 23. El. c. 2.
pis. Et postea, scilicet, vicesimo die Maii, anno regni dicti Regis decimo quinto, apud villam *Westmonasterii* prædictam, prædicti *Johannes Stacy* et *Thomas Blake*, falso & proditorie artibus prædictis laboraverunt; licet juxta determinationem sacram, sanctæ Ecclesiæ ac doctrinam diversorum Doctorum, cuilibet Ligeo Domini Regis, de intromittendo de Regibus & Principibus, in forma prædicta, absque eorum voluntate, & Preceptis inhibitum fuit. Et postea, iidem *Johannes Stacy* & *Thomas Blake*, ac prædictus *Thomas Burdet*, apud prædictam villam *Westmonasterii*, vicesimo sexto die Maii, eodem anno decimo quinto, cuidam *Alexandro Russeton*, & aliis de populo Domini Regis, falso & proditorie manifestaverunt & dixerunt, quod per calculationem & artes prædictas, per ipsos *Johannem Stacy* & *Thomam Blake*, in forma prædicta factas iidem Rex & Princeps non diu viverent, sed infra breve obierent. Ad intentionem quod per detectionem & hujusmodi materiæ manifestationem, Populi ipsius Regis magis ab ipso Rege cordialem amorem retraherent. Et idem Dominus Rex per notitiam illarum, detectionis & manifestationis, tristitiam inde caperet & abbreviationem vitæ suæ. Ac quod prædictus *Thomas Burdet*, mortem & destructionem ipsius Regis supremi dicti Domini sui, & prædicti Domini Principis, ac subversionem Legum suarum per guerram & discordiam inter ipsum Regem & ligeos suos in regno prædicto movendum, sexto die Martii, anno regni dicti Regis decimo septimo apud Holborn, in Comitatu *Middlesexiæ*, falso & proditorie imaginavit, compassus fuit, & circuivit, ac ipsos Regem ac Principem interficere proposuit. Et ad illud falsum nefandum propositum suum finaliter primplendum, prædictus *Thomas Burdet*, diversas billas & scripturas in rythmis & balladis de murmurationibus seditionibus, et proditoriis excitationibus, factas et fabricatas apud Holborn, et villam *Westmonasterii* prædict. falso et proditorie disperfit, projecit, et seminavit dicto sexto de Martii, ac quinto et sexto diebus Maii, dicto anno decimo septimo, ad intentionem quod Populi Domini Regis cordialem amorem ab ipso Rege retraherent ac ipsum relinquerent, ac erga ipsum Regem insurgerent, et guerram erga ipsum Regem levarent in finalem destructionem ipsorum Regis ac Domini Pricipis, et contra ligeanciam suam, necnon contra Coronam et dignitatem ipsius Regis.

Judgment, to be hanged, drawn, and quartered.

Hanc, anno decimo octavo Edvardi quarti. Johannes Alkerter, Yeoman, nuper serviens *Richardi* Comitis *Warwici* et *Sarum*, à diuturno tempore proponens statum Regis pejorare et de regimine, *&c.* quantum in se fuit proditorie; per diversa verba nefanda, et alia dicta sua venenosa, de diversis murmurationibus, seditionibus proditorum excitationibus factis et fabricatis à gubernatione privare, *&c.* Ad intentionem quod Populi ejusdem Regis cordialem amorem retraherent, per discordiam inter Regem et Populum suum movendum proditorie

dixit *Willielmo Pend*, *Willielmo Fowle*, & *Sampſoni Halk*, ſub hac forma, viz. Quod *Willielmus Pend* & *Johannes Alkerter*, olim ſervientes dicti *Richardi* Comitis *Warwici* fuerunt, & nunc quod idem Comes diem ſuum clauſit extremum; Et hoc non obſtante infra breve haberent Comitem *Oxoniæ* (qui ſuperſtes eſt) infra hoc regum *Angliæ*, qui in futuro parcellam hujus patriæ gubernet affirmandoque ulterius verba ſua cuidam *Galfrido Peke*, Quod *Edvardus* quem vos vocatis Regem *Angliæ* falſo fuit, &c. dicendo, Quod idem *Edvardus*, per ſubtilem artem ſuam, eundem Comitem *Warwici* interfecit et murdravit; ac fratrem ſuum, nuper Ducem *Clarenciæ*, ad mortem ſimili modo traxit, non habens cauſas nec aliquam veritatem; Et dicendo, Quod quicunque inheritabilis ſit directe poſt mortem naturalem *Henrici* ſexti, (nunc de facto, et non de jure, Regis *Angliæ*) ad Coronam *Angliæ* ille tantummodo ſineret et ſuus homo eſſet. Et multa alia hujuſmodi verba proditorie dixit.

Utlagatus fuit prout patet per rotul. Seſſion. *Kanc.* anno 18. Ed. 4.

Kanciæ, anno decimo octavo Edvardi quarti. Thomas Hever indictatur, pro eo quod proditorie dixit, Quod ultimum Parliamentum Domini Regis, apud *Weſtmonaſterium* tentum, magis ſimplex et inſufficiens fuit quam unquam antea: Et ulterius, Quod Dominus Rex propoſuit moram ſuam infra Comitatum *Kanciæ* trahere et amorem ligeorum ſuorum ibidem habere, quia amorem cordialem infra eandem Civitatem non habuit, nec in futuro habebit: Et quod ſi Epiſcopus *Bathonienſis* morietur, quod tunc immediate *Thomas* Archiepiſcopus *Cantuarienſis* et Cardinalis *Angliæ* caput ſuum amitteret. Et multa diverſimoda verba proditoria de Rege quam alia verba malitioſa de Dominis ſuis, tam ſpiritualibus quam temporalibus.

Utlagatus prout patet per rotul. Seſſionis.

London. Hillar. an. ſecun. Ricardi tertii. Willielmus Collingbourn, nuper de Lydyard in Comitatu *VViltſ.* Armiger, et alii falſi proditores, mortem Regis et ſubjectionem regni proditorie imaginaverunt et compaſſi fuerunt: Et ad illud perimplendum, excitaverunt, &c. quendam *Tho. Yate* ei offerendo octo libras ad partes tranſmarinas exire, ad loquendum ibidem cum *Henrico*, nuncupante ſe Comit. *Richmundiæ*, et aliis, &c. proditorie attinct. per Parliamentum, &c. Ad dicendum, Quod ipſi cum omni poteſtate, &c. revenirent in *Angliam*, citra feſtum Sancti *Lucæ* Evangeliſtæ; Et totum integrum redditum totius regni *Angliæ*, de Termino Sancti Michaelis, &c. in eorum relevamen haberent; Et ulterius, ad demonſtrandum eis, Quod per concilium ipſius *Willielmi Collingbourn*, ſi dictus comes *Richmundiæ*, et alii, &c. ad terram *Angliæ*, apud Poole in Comitatu *Dorceſtriæ*, arrivare voluerunt. Ipſe *Willielmus Collingbourn* et alii proditores, eis aſſociando commotionem populi ipſius Regis, inſurrectionem et guerram erga ipſum Regem interim levare cauſarent; et partem ipſorum falſorum proditorum contra Regem in omnibus acciperent; et omnia infra regnum *Angliæ*, ad eorum diſpoſitionem eſſent; Et ulterius, ad dicendum

dum & demonſtrandum dictis proditoribus, &c. ad deſtinandum *Johannem Cheyney* uſque ad Regem *Franciæ* ad demonſtrandum ſibi, quod Ambaſſiatores ſui in *Angliam* à dicto Rege *Franciæ* venientes, defraudari debeant: Et quod Rex *Angliæ* nullum promiſſum eis cuſtodiret; ſed ſolummodo ad deponendum, ſeu ad reſpectuandum, guerram inter Dominum Regem tempore Hiemali: Eo quod in principio temporis Æſtivalis, Anglica poteſtas in omnibus preparari poſſit ad bellum dicto Domino Regi *Franciæ* præbendum, & eundem Regem & terram ſuam adtunc finaliter diſtruendo. Et ulterius ad adviſandum ipſum Regem *Franciæ* ad auxilium dictorum proditorum pecuniis, &c. Ut ipſe iter Regis *Angliæ* uſque terram *Franciæ*, impedire proponet. Et ſic prædictus *Willielmus Colingbourn* & alii, fuerunt proditorie adhærentes, &c. Et quod prædictus *Willielmus Collingbourn*, & alii falſi proditores, Deum præ oculis, &c. à diutino tempore, intendens per Covinam, aſſenſum & voluntatem diverſorum aliorum proditorum eiſdem proditoribus adhærentium, &c. aſſociaverunt. Et mortem Regis per guerram, commotionem, & diſcordiam inter Regem & Ligeos ſuos, infra regnum *Angliæ* levandum, compaſſi ſuerunt, &c. Et ad illud perimplendum, prædictus *Willielmus Collingbourn*, et alii, diverſas billas & ſcripturas in rythmis & balladis de murmurationibus, ſeditionibus, & loquelis, & proditoriis excitationibus, falſo & proditorie fecerunt, ſcripſerunt, & fabricaverunt, & illas per ripſos ſic factas, ſcriptas, & fabricatas, die, &c. ſuper diverſa oſtia Eccleſiæ Cathedralis ſancti *Pauli London.* proditorie poſuerunt, & publice ibidem fixerunt, ad movendum & excitandum Ligeos Regis billas & ſcripturas illas legentes & intelligentes, commotionem & guerram erga ipſum Regem facere & levare, contra ligeanciæ ſuæ debitum & finalem deſtructionem Regis, & ſubverſionem regni, &c.

Judgment, to be hanged, drawn, and quartered.

London, anno nono Henrici ſeptimi, Thomas Bagnàll, & alii, mortem Regis imaginaverunt, &c. Et ad intentionem prædictam, Quod Populi Regis cordialem amorem retrahere, &c. diverſas billas & ſcripturas in rythmis & balladis de murmurationibus, ſeditionibus, & proditoriis excitationibus, tam verſus Regem quam alios magnates de Concilio ſuo tangent, proditorie fecerunt, &c. ſuper oſtium Eccleſiæ ſancti *Benedicti* in Gracious-ſtreet, & ſuper *le* Standard in Cheap, ac ſuper oſtium Eccleſiæ *Pauli* poſuerunt, &c. Et quod ipſi fuerunt adhærentes cuidam *Peto Warbeck* inimico Regis in partibus tranſmarinis exiſtent. ad levandum guerram ad deponendum Regem

Judgment, to be hanged drawn, and quartered.

Middl. decimo Henrici ſeptimi. Willielmus Stanley miles, & *Robertus Clifford* miles, ad invicem inter ſe communicaverunt & interlocuti ſuerunt de quodam *Petro Warbeck* de *Thornaco* ſub obedientia Archiducis *Auſtriæ* & *Burgundiæ* inimico Domini Regis, &c. falſo nuncupante ſe fore *Richardum*, ſecundum filium Domini *Edvardi* nuper Regis *Angliæ*, quarti, in partibus exterioribus ultra mare exiſtent. ac Bak. Hiſt. 136. God b. 268.

mortem, &c. Regis ac ſubverſionem regni *Angliæ*, proditorie conſpiraverunt, &c. Et eundem Regem per guerram, &c. in regno *Angliæ*, levandum de Corona &c. deponendum, &c. Et ad illud perimplendum, &c. prædicti *Willielmus Stanley* & *Robertus Clyfford* proditorie, &c. inter ſe aggreati fuerunt, quod ipſe *Robertus* ad partes exteras prædictas, ad præfatum *Petrum Warbeck*, &c. transfretaret, & in ipſius *Petri* adventum ad guerram levandum expectaret. Et ipſum *Petrum* in regnum *Angliæ*, cum toto poſſe ſuo introduceret, ipſum in Regem erigeret, &c. Et ulterius, dictus *Willielmus Stauly* præfato *Roberto Clyfford* proditorie promiſit, &c. ad quodcunque & quotieſcunq; ipſe *Rob. Clyfford* aliquos ad domum *Willielmi Stanley* à partibus exterioribus, per privatum ſignum inter ipſos habitum, deſtinaret, pro ipſius ac dicti *Petri Warbeck* inimicorum Regis, &c. adjuvamine; ipſe *Will' Sanley* eo toto poſſe adjuvare vellet, &c. Quorum, &c. prætext', dict' *Robertus Clyfford* iter ſuum ad partes exteras, præfato *Petro Warbeck*, arripuit, &c. Et ſic fuerunt adhærents, &c.

Judgment, to be hanged, drawn, and quartered.

Surrey. anno triceſimo Henrici octavi. Henricus Marchio, Exon. proditorie dicebat, I like well of the proceedings of Cardinal Pool, Et ulterius, But I like not the proceedings of this Realm: And I truſt to ſee a change of the world. Et ulterius, I truſt once to have a fair day upon thoſe Knaves which rule about the King. Et ulterius, I truſt to give them a buffet one day. Et quod *Nicholaus Carew* Miles, malitioſe et proditorie murmuravit, et indignatus fuit, et dicebat hæc verba Anglicana, I marvel greatly that the Indictment againſt the Lord Marqueſs was ſo ſecretly handled, and to what purpoſe; for the like was never ſeen.

Per bagam Seſſionis tent. coram *Thom. Audley* Cancellar. et alios, 30. *Hen.* 8.

Berk. triceſimo primo Henrici octavi. John Rugg, Chivaler, for theſe words, The Kings Highneſs cannot be ſupream head of the Church of England by Gods Law. *Hugo* Abbas de Reading ſuperinde dixit, What did you for ſaving your Conſcience, when you were ſworn to take the King for ſupream head? Et ſuperinde prædictus *Joh. Rugg* dixit, I added this condition in my mind, To take him for ſupream head in temporal things, but not in ſpiritual things.

Per Indictam. Mich. 31. *Hen.* 8.

Kanc. anno triceſimo primo Henrici octavi. Rob. Rumwick indictatur, Quod cum diverſi fuerunt comedentes et compotantes, &c. *Thomas Brook*, tenens quendam ciphum cerviſiæ impletum, &c. dixit, God ſave the King, Here is good Ale. Ad quod prædictus *Robertus* dixit proditorie, &c. deſiderans mortem Regis, &c. God ſave the cup of good Ale; for King Henry ſhall be hanged, when twenty others ſhall be ſaved. Cui prædictus *Thomas* dixit, Knoweſt thou what thou ſayeſt; Prædictus *Robertus* interum dixit, ut ſupra God, &c.

Leiceſt.

Leiceſt. anno triceſimo tertio Henrici octavi. Lioneilus Haughton, nuper de Dzemskirk in Comitat. *Lancaſtriæ*, Taylor, pro verbis, viz. being ſhooting at the Butts ſaid, I would the Kings body had been there as the arrow did light; And, By the Mass I would it had been in his body.

Per indictament. Mich. 33. H. 8.

Edward Peacham was endicted of Treaſon, for divers Treaſonable paſſages in a Sermon, which was never preached, or intended to be preached, but only ſet down in writings, and found in his ſtudy: he was tryed and found guilty, but not executed. Note, that many of the Judges were of opinion, That it was not Treaſon.

Henry Challercomb was alſo endicted of Treaſon for words, and was found guilty, and executed. Poſt. 332.

John Williams was alſo endicted, found guilty, and executed, for writing a Treaſonable book, called *Baalams Aſſe*. 3 Inſt. 14. R 456.

Upon Conſideration of all which preſidents, and of the Statutes of Treaſon, it was reſolved by all the Judges before named, and ſo certified to his Majeſty, That the ſpeaking of the words before mentioned, though they were as wicked as might be, was not Treaſon: For they reſolved, That unleſs it were by ſome Particular Statute, no words will be Treaſon; for there is no Treaſon at this day, but by the Stat. of *viceſimo quinto Edvardi tertii*; for imagining the death of the King, &c. And the endictment muſt be framed upon one of the points in that Statute; And the words ſpoken here can be but evidence to diſcover the corrupt heart of him that ſpake them: but of themſelves they are not Treaſon, neither can any Endictment be framed upon them. 3 Inſt. 22. 5. 1 Mar. cap. 1. 3 Inſt. 5.

To charge the King with a perſonal vice, as to ſay of him, That he is the greateſt Whoremonger or Drunkard in the Kindom, is no Treaſon, as *Yelverton* ſaid it was held by the Judges, upon debate of *Peachams* Caſe.

Termino Michaelis, anno quarto *Caroli* Regis, in Banco Regis.

IN this Vacation, viz. upon the eleventh day of September, *anno Domini* 1628. Sir *John Dodridge*, one of the Juſtices of the Kings Bench, dyed at his houſe in *Egham*, in the County of *Surry*; a man of great knowledge, as well in the Common Law, as in other humane Sciences, and Divinity. After whoſe death, becauſe there were five Judges in the Common Bench, whereof my ſelf was the fourth, whereas uſually there were but four in the ſaid Court, and as many in the Kings Bench. The King, intending to reduce thoſe Courts to their uſual courſe, upon the three and twentieth day of the ſaid September (having had communication with the Lord *Coventry*, Lord Keeper of the great Seal) nominated me to be one of the Juſtices of the Kings Bench, & ſigned a Warrant the ſame day for my Patent, to be Juſtice there; and another warrant reciting my firſt Patent of Juſtice of the Common Bench, & determining his pleaſure concerning that place (ſaving all wages & ſums, &c.) And the Patent of Juſtice of the Kings Bench was ſealed upon the ninth day of October, and bare date the ſame day; and the Patent of revocation of my place of Juſtice the of Common Bench was ſealed upon the tenth day of October, and both Patents were delivered me upon the eleventh day of that Moneth, at ſuch time as I was ſworn Juſtice of the Kings Bench. And a queſtion was then moved about my antiquity, I having one Juſtice in the Common Bench (viz. Juſtice *Yelverton*) and two of the Barons in the Exchequer (viz. *Trever* and *Vernon*) my *puiſnyes*, and had not a clauſe of ſaving ſuperiority, precedency, and antiquity, as was in the ſecond Patent of Juſtice *Nichols* (he being firſt one of the Judges in the Common Bench; and having a Patent to diſcharge him from that place, was then made the Princes Chancellor, and two days after Juſtice of the Kings Bench, with an expreſs exception and allowance to be Chancellor to the Prince, and ſaving his precedency and ſeniory;) but all the Juſtices, aſſembled at the Lord Keepers houſe, agreed, That I needed not ſuch a ſaving, For my Patent continued until the time I was Judge of the Kings Bench, & I never ceaſed to be a Judge, but was tranſlated only: And the Juſtices conceived, The Patent of revocation of my Juſtice place in the Common Pleas

1.

Ants 4. Co. Pref. 4.

Jones 192.

Pleas was needleſs; becauſe, by making me Juſtice in the Kings Bench, my former Patent was in Law determined, according to the Caſe *in quinto Mariæ*, *Dyer* 159. Yet, for better ſecurity, there was one made, according to the preſident of Juſtice *Jones* his Patent, when he was removed out of the Common Pleas to be Judge in the Kings Bench.

Cuſacks Caſe.

2. CUſack was condemned in the Sheriffs Court in London, for Debt, and taken in execution: Afterwards, by an Habeas Corpus upon ſuit in the Kings Bench, the ſaid execution, with other Cauſes, were returned; Whereupon he was committed to the Marſhall in execution for that debt, and other his executions in the Kings Bench. And now all the Executions in the Kings Bench were diſcharged; and the Judgment in London reverſed, by a Writ of Error in the Huſtings: And how he ſhould be diſcharged of this Execution was the queſtion? For this Court hath no Record of the Execution, but by the return of the Habeas Corpus. And of the reverſal of that Judgment they have not any Record, but what is only ſurmiſed; And they may not award a Cerciorare to London; for they there will not return it: whereupon it was adviſed, That all matters here concerning that Execution being diſcharged, he might be remitted to London for that cauſe, and there be diſcharged. Vide viceſimo nono Edvardi tertii, folio quadrageſimo ſeptimo; quadrageſimo octavo Edvardi tertii, folio viceſimo ſecundo; triceſimo nono Henrici ſexti, folio quinquageſimo quarto et quinto Philippi et Mariæ, Dyer 152. tertio Elizabethæ, Dyer 187.

Geery *verſus* Reaſon.

3. 1 Rol. 518. COvenant. The Plaintiff declares, That by Articles indented, ſhewn, *&c.* in anno Dom. 1624. he demiſed to the Defendant certain Rooms in Bear-Alley, untill Midſommer anno 1626. rendring the ſumm of ſix pound and thirteen ſhillings four pence rent, provided, and upon condition, That the ſaid *Reaſon* ſhall gather the rents of other the Plaintiffs Tenements in *Bear-Alley*, reſerved quarterly & mentioned in a ſchedule, & pay the ſame within twenty dayes after every quarter day; And it is agreed, That the ſaid *Reaſon* ſhall retain the reſt of the benefit to be made of the ſaid Rooms, over and above the ſaid ſix pounds thirteen ſhilling four pence *per annum*, for his pains in gathering up the ſaid Rents: And ſhews, That the Rents were mentioned in the ſchedule, and amounted unto an hundred and ninty pounds per annum; And, That the Defendant had not paid the ſaid Rents: But he did not ſhew, that the Defendant had gathered them; And thereupon the Defendant demurred. For it ſeemeth, That here is not any Covenant, to gather or pay the Rents; but a forfeiture of his Leaſe, if he do not gather, and

and pay them, being gathered: and if he doth not pay them, being gathered, an account lies; But Germine for the Plaintiff insisted much, That these words, Provided, &c. in the Indenture shall make a Covenant; but all the Justices conceived it is not a Covenant, but meerly a Condition annexed to the Estate, which determines it by not collecting and paying the rent: And it is not to be intended, That it should be a Covenant to inforce him to gather and pay them, where peradventure he cannot collect them. And thereupon, without argument, it was adjudged for the Defendant. 1 Rol. 518. Co. 2. 70. 71. Co. Litt. 203. b.

Chamberlaine *versus* Turner.

4. Jones 195. Post. fol. 200.

EJectione firmæ for an house called the White Swann in Old-street in London. A speciall Verdict was found, That Henry Metcalf was seised in Fée of the said house, and of a garden thereto appertaining, and held it in Socage, and made his Will in this manner, which is found verbatim. I devise all my Fee simple Lands, Goods and Tenements to *Henry Metcalf* my Son, and the Heirs males of his Body, and for default of such issue remainder to his right Heirs; and made him Executor, and appointed that he should pay his debts out of his Goods and Lands. And I devise the House or Tenement, wherein *William Nicholls* dwelleth, called the *White-Swann* in *Old street*, to *Henry Gallant* my Daughters Son for ever. And the Jury found, That the said William Nicholls, at the time of the said Will making; and of the Testators death, inhabited and occupied the Entry or Alley of the said house, and three upper rooms therein: And that divers other persons at the same time, held and occupied the Garden, and other places in the said house; And that William Heylock and his Wife held another room; And that Henry Gallant, claiming that house, entred and made a Lease thereof to the Plaintiff; and the Defendant, by the command of the said Metcalf, Heir of the Devisor, *ousted* him. Et si super totam materiam, &c. This Case being argued at the Barr by Banes and Calthrop for the Defendant, and by Andrews for the Plaintiff, two Questions were moved; First Whether the Heir of Gallant had any more than an Estate for life by this devise, because all his Fée-simple Lands, being before devised to his Son and Heirs Males, he afterwards devised that house to Henry Gallant for ever? And if it be but an Estate for life, extracted out of the first Estate, then it is determined; and he relyed upon Alice Lunchams Case in decimo nono Elizabethæ, Dyer 357. But all the Court resolved, That it is a Fée-simple, because of the words in perpetuum, or for ever; And it is not like the Case of Alice Ludham, where an express Fée was given to one, and after his death devised to another for life. The second Question was, Whether all the House passed, or the Entry, and those three Rooms which were in the possession of the said William Nicholls only; and Hide chief Justice doubted thereof; For it may be intended that he did Co. Litt. 9. b. Jones 195.

not deviſe more than Nicholls occupied? But Jones, Whitlock, and my ſelf were of opinion, That all the houſe paſſed to the Deviſee; for the Deviſe being, That houſe or Tenement, and the concluſion, called the White-Swan, doth both of them neceſſarily impoꝛt the whole houſe; for the Sign of the White Swan cannot be intended to refeꝛr to theſe Rooms: And the woꝛds after, viz. wherein William Nicholls dwelleth, doth not abridge oꝛ alter that deviſe; And the houſe being named by the particular name of the White-Swan, although William Nicholls never inhabited therein, yet it paſſeth by the Deviſe, and is good, becauſe he inhabited therein, although he occupied but theſe Rooms of it; But if the houſe had not been named by the particular name of the White-Swan, and he had deviſed the houſe in the occupation of William Nicholls, there peradventure it ſhould not extend to moꝛe than what was in the occupation of William Nicholls, and not to that which was in the occupation of others, accoꝛding to the Caſe of Andrew Ognell. Coke lib. 4. fol. 48, 50. And the Caſe of Hunt and Singleton, where a Leaſe was made to one Cales of an houſe, and he lets out of that two Chambers, and after ſurrenders the Leaſe, and a new Leaſe was made to the ſaid Cales of the houſe in his occupation; it was adjudged only of the houſe in his occupation, and not of the two Chambers; for there was a good Leaſe of the houſe, although the two Chambers were not deviſed; but the deviſe being of the houſe called the White-Swan, wherein Nicholls inhabiteth, cannot be intended, That the deviſe ſhall be of the theſe Chambers only, becauſe it cannot be termed the houſe called the White-Swan: And whereas it was objected, That it is not found, that Henry Metcalf had other lands in Fee-ſimple to ſupply the firſt deviſe, and therefoꝛe neceſſarily it ought to be extended to the reſidue of that houſe, and then it paſſeth not all: The Juſtices anſwered thereunto, That it ought to be intended, although it be not expreſſed that he had other lands; and the doubt of the Jury was, whether the intire houſe paſſed by thoſe woꝛds: So if they be ſatisfied, the Court ſhall not doubt of moꝛe than what the Jury have found: Et adjurnatur, & poſtea fuit adjudged accoꝛdingly.

3. Cr. 113.

Poſt. 448.

3 Cr. 474.

2 Cr. 649.

Ant. 22. p. 392. 458.

Inkerſalls *verſus* Samms.

5. Jones 192.

ASſumpſit againſt the Defendant as Executoꝛ. Whereas the Teſtatoꝛ in his life, viz. upon the ſixteenth day of October, anno decimo octavo Jacobi Regis, in conſideration of five pounds ſent unto him, pꝛomiſed to pay, &c. The Defendant pleads, That the Teſtatoꝛ non aſſumpſit; the Jury find that the Teſtatoꝛ aſſumpſit modo & forma, but that the Teſtatoꝛ dyed ſuch a day, viz. in anno decimo ſeptimo Jacobi, ſo as he was dead a year and moꝛe beꝛoꝛe the time which is alledged in the Recoꝛd. And at the firſt argument the Court held foꝛ the Plaintiff, That the Verdict being, That the Teſtatoꝛ aſſumpſit modo & forma, the finding over that the

Ant. 76. p. 112.

the Testator dyed before the time mentioned in the Declaration, is Post. 174.
idle, superfluous, and not material, nor is the day of the Assumpsit material: And although he were dead before the day mentioned in the Declaration, it is good enough; And thereupon it was adjudged for the Plaintiff. Vid. vicesimo tertio Elizabethæ, Dyer 372. Coke 2. Rep. fol. 4. Goddards Case.

Halloways Case.

HAlloway was endicted and arraigned at Newgate, for murdering one Payne. The Endictment was, That he ex malitia sua præcogitata tyed the said Payne at an Horse tail, and struck him two strokes with a cudgell, being tyed to the said Horse, whereupon the Horse ran away with him, and drew him upon the ground three furlongs, and thereby brake his shoulder, whereof he instantly dyed, and so murdered him. Upon this Endictment, he being arraigned, pleaded Not Guilty; and thereupon a special verdict found, That the Earl of Denby was possessed of a Park called Austerly Park, and that the said Halloway was Woodward of his Woods in the said Park, and that the said Payne with others unknown entred the said Park, to cut wood there, and that the said Payne climbed up a tree, and with an Hatchet cut down some boughs thereof, and that the said Halloway came riding into the Park, and seeing the said Payne on the tree, commanded him to descend, and he descending from thence, the said Halloway stroke him two blows upon the back with his cudgell; and the said Payne having a rope tyed about his middle, and one end of the rope hanging down, the said Halloway tyed the end of that rope to his Horses tail, and struck the said Payne two blows upon his back; whereupon the said Payne being tyed to the Horses tail, and the Horse running away with him, drew him upon the ground three furlongs, and by this means brake his shoulder, whereof he instantly dyed; and the said Halloway cast him over the pales into certain bushes. And whether upon all this matter found, the said Halloway be guilty of the murder pro ut? they pray the discretion of the Court; and if the Court shall adjudge him guilty of the murder, they find him guilty of the murder; If otherwise, they find him guilty of manslaughter; and this special verdict by Cerciorare was removed into the Kings Bench, and depended three Terms: and the opinion of all the Judges and Barons was demanded, and they all (besides Hutton, who doubted thereof) held clearly, That it was murder. For when the Boy, who was cutting on the tree, came down from thence upon his command, and made no resistance, and he then struck him two blowes, and tyed him to the Horses tail, and then struck him again, whereupon the Horse ran away, and he by that means slain; the Law implyes malice, and it shall be said in Law to be prepensed malice, he doing it to one who made no resistance: And so this Term all the Justices delivered the reason of their opi- 6. Jones 198.

nions; whereupon Judgment was given, and he was adjudged to be hanged, and was hanged accordingly.

Juxon *verſus* Thornhill, Trinty 4. Car. rot. 76.

7. 1 Rol. 464. Aſſumpſit. Whereas the Plaintiff by the Kings licence, had erected in Godmanchester, and in five other places in his own land, ſix ſeveral Sluces or Locks upon the River Ouſe, for the better raiſing and heightning the water in the River, for the eaſier paſſage of Boats through the ſaid Locks. And the King had granted unto him to take ſuch reaſonable ſumms for the paſſage through the ſaid Locks, as ſhould be agréed upon betwixt him and thoſe who ſhould have ſuch paſſage: And for that there was contention betwixt him and the Defendant, and divers others, what ſumms ſhould be paid for ſuch paſſage, a petition was thereupon preſented to the Lords of the Councill, and by them referred to the Earl of Manchester, Lord Preſident, to ſet down what rates thoſe which paſſed through the ſaid Locks ſhould pay. That the Defendant in conſideration the Plaintiff would permit him to paſs through the ſaid Locks, upon the twentyeth day of October, anno tertio Caroli Regis, promiſed unto the Plaintiff, That he would pay him ſuch ſumms as the ſaid Lord Preſident ſhould appoint; and alledgeth in facto, That betwéen the ſaid twentieth day of October, and the twenty third day of April following, he paſſed through the ſaid Locks with his boats, and carried two thouſand one hundred and twenty tonns of coal. And that upon the twenty fourth day of April, the ſaid Earl of Manchester ſet down and ordered, That two pence half penny ſhould be paid for every tonne which paſſed through the ſaid Locks, in every Lock two pence half peny: And that for the ſaid two thouſand one hundred and twenty tonne, according to the ſaid rate, the Defendant ought to pay him eleven pounds. And that upon the twenty ninth day of April then next following, he requeſted the Defendant to pay the ſaid eleven pounds, and he refuſed to pay it, whereupon he brought this Action; the Defendant pleaded non aſſumſit, and it was found againſt him, and now moved in arreſt of Judgment; Firſt, That it is no good conſideration, becauſe the River of Ouſe is a common River, and it is not lawfull for any to make ſtops upon the River, Poſt. 184. 185. or to take ſumms of money for the paſſage through the Locks. Sed non allocatur: For the Locks are upon the Plaintiffs own land, and at his coſt, for the exaltation of the water, and making the River navigable for Veſſels of burthen; and it ſtands with good reaſon that they ſhould pay for their paſſage, according to their agréemen. The ſecond exception was, Becauſe it is not ſhewn that R 725. the Defendant had any notice given him of the Earl of Manchesters order; ſed non allocatur, becauſe he ought to pay as much as he 1 Rol. 464. ſhould appoint; and the Defendant is to take notice of his order, as 2 Cr. 288. well as the Plaintiff, he being a ſtranger to both; as where one is obliged

obliged to perform an arbitriment, there needs not any notice be given unto him, but he ought to take notice at his perill. Also the Plaintiff allegeth, That he required the summe according to the Order which is an implyed notice; Whereupon rule was given, That Judgment should be for the Plaintiff, unless further matter should be shewn to the contrary by such a day.

Chambers Case.

CHambers being in prison in the *Marshalsey del hostel de Roy*, desired an Habeas corpus, and had it; which being returnable upon the fifteenth day of October, the Marshall returned That he was committed to prison the twenty eighth day of September last, by the command of the Lords of the Councill. The Warrant verbatim was, That he was committed for insolent behaviour, and words spoken at the Councill Table, which was subscribed by the Lord Keper and twelve others of the Councill. And because it was not mentioned what the words were, so as the Court might adjudge of them, the return, was held insufficient, and the Marshall advised to amend his return, before the twenty first of October following; and he was by rule of the Court appointed to bring his Prisoner then, without a new Habeas corpus, and the Prisoner was advised, That in the mean time he should submit to the Lords, and petition them for his enlargement. Upon the said 21. of October the Marshall had his Prisoner there; but because the great Case of Sir. William Withipole was to be debated that day, and time would not permit to treat of this matter, The Marshall was commanded to bring again his Prisoner, and have him in Court the twenty third day of October. Then Germin for the Prisoner moved, That forasmuch as it appeared by the Return, That he was not committed for Treason or Felony, nor doth it appear what the words were, whereto he might give answer; he therefore prayed, he might be dismissed or bayled. But the Kings Attorny moved, That he might have day, until the twenty fifth of October, to consider of the return, and be informed of the words, and that in the interim the Prisoner might attend the Councill Table, and petition. But the Prisoner affirmed, That he oftentimes had assayed by petition, and could not prevail, although he had not done it since the beginning of October; and he prayed the Justice of the Law, and the Inheritance of a Subject: Whereupon, at his importunity, the Court commanded him to be bayled; and he was bound in a Recognisance of four hundred pounds; and four good Merchants his sureties were bound in Recognisances of one hundred pounds a piece, That he should appear here in Crastino animarum, and in the interim should be of good behaviour; And advertized him, They might, for contemptuous words, cause an Endictment or Information, in this Court, to be drawn against him, if they would. Residum postea. pag. 168.

8. R. 110. R. 670. Post. 507 579. 593. 2 Cr. 81.

Sir

Sir William Withipoles Caſe.

9. Ley 81. Jones 198.

SIR William Withipole being endicted, before the Coroners, for the murder of Madyſon, and being arraigned upon that enqueſt informed the Court, he had matter in Law to plead, to avoid that endictment, and that he ought not to be put to anſwer; and prayed that Councell might be aſſigned him: And Mr. Noy and others were aſſigned, who, at another day, put in a Plea for him, That he ought not to be impeached upon this Endictment; for he ſhewed in his Plea the Statute of undecimo Henrici quarti, capite nono, That none ſhall be put upon any pannel of Enqueſt, at the denomination of any perſon, unleſs by the Bayliffs and miniſters of the Sheriffs, ſworn and known; And that the ſaid Jurors ſhould be probi & legales homines; And further pleads, That Allton the fore-man of the Jury, nominated himſelf to be of the Jury, and fourteen others, (ſhewing their names) and one Alexander Farrington required him to return them, he not being Sheriff, nor Bayliff of the Franchiſe, nor any miniſter of any Sheriff, nor Bayliff of any Franchiſe, who ought by the Law to return them; And by the ſaid Jury the ſaid inquiſition was found; and he further pleaded, That two of the ſaid Jurors were outlawed in Actions of debt, the one in the twelfth year of King James, the other in the firſt year of King Charles, and produced the Records, being ſent by Mittimus out of the Chancery; and averred, That the outlawries are yet in force, not reverſed nor vacated. And upon this Plea pleaded, the Court would adviſe whether it ſhould be accepted, and what ſhould be done thereupon, either demurre or joyn iſſue. The firſt Queſtion was Whether the Statute of undecimo Henrici quarti extends to Enqueſts before Coroners, or only to Endictments before Juſtices of the peace, and of *Oyer* and *Terminer*? Secondly, Admitting, That this Statute extends thereunto, Whether it extends to perſons outlawed in perſonal Actions, or only to perſons outlawed for Felony or Treaſon? And becauſe this was the firſt plea that had been upon that Statute, and would be a preſident in Crown matters, the Court would adviſe. And all the Juſtices of both Benches, and Barons of the Exchequer, met thereupon at Serjeants-Inne in Fleetſtreet; and having had conference of theſe points, the greater part of the ſaid Juſtices and Barons were of opinion, Firſt, That the Statute of undecimo Henrici quarti extends as well to Enqueſts before the Coroners, as to Endictments before Juſtices of peace. Secondly, That it extends to perſons outlawed in perſonal Actions, becauſe an outlawed perſon is not accounted probus & legalis homo to be ſworn in an Enqueſt, and may be challenged for that cauſe, Vide 34. Edvardi primi, proces 208, 21. Hen. 6. 30. But divers others of the Juſtices and Barons were of the contrary opinion, Firſt becauſe the Statute of undecimo Henrici quarti begins with Enqueſt before the Juſtices, and ſo the Act ſeems to extend to them;

Poſt. 365. R 730.

R 127.

Poſt fol. 147. Co Litt. 158. a 3 Inſt. 32. 33.

them; and the Statute mentions Denomination to the Sheriff or Bayliff of the Franchise; and the Enquisition before the Coroners, is to be of persons within the four next adjacent Villages, to be made by the Bayliffs, or Constables of those Villages, as appeareth by the Statute of quarto Edvardi primi, de officio Coronatoris, and Crompton, folio 113. That no challenge shall be to any of the Enquest before the Coroners. Residum postea. pag. 147.

William Vicount, Say and Seal, *versus* Stephens,
Trin. 4. Car. rot. 602.

ACtio de scandalis Magnatum. The Plaintiff declares by the name of *William Vicount, Say and Seale* unus Procerum & Magnatum hujus Regni *Angliæ* tam pro Domino Rege, quam pro seipso queritur of the Defendant in custodia *Marescalli* pro eo; whereas by the Statute of secundo Richardi secundi it was ordained, &c. (reciting the Statute) the Defendant not regarding nor respecting the Statute aforesaid primo Februarii anno tertio Caroli, at the Parish of Bow in Warda de Cheap London, having communication with Alice Gilbert, a Servant of the said William Vicount Say and Seal, of him the said Vicount, in the presence and hearing of divers of the Kings Subjects, then and there being; hæc falsa & scandalosa verba de eodem Vicecomite Say & Seale dixit & publicavit, viz. *Thy Lord* (dictum Comitem innuendo) *is a Traytor, & I will prove him* (prædictum Comitem innuendo) *a Traytor*. The Defendant pleaded Not Guilty, and it was found against him, and damages assessed to two thousand pounds; And it was now moved in arrest of Judgment by Serjeant Crawley and Mr. Calthrop; First, That this Statute is misrecited, and then, he founding his Suit for himself and the King, and there being no such Statute, hath failed. And in proof thereof they relyed upon the Case of the Lord Cromwell, Coke 4. Rep. fol. 12. where an Action was brought upon this Statute and misrecited, Nuncia pro mendacia, there the Plaintiff might not have Judgment. And the Case in Plowdens Commentaries, fol. 82. betwixt Partridge, and Strange, and Croker, where an Action was founded upon the Statute of tricesimo secundo Henrici octavi capite nono, of maintenance, where the date of the Statute was mistaken, and there the Plaintiff might not have Judgment; for the Court did not intend any other Statute than that whereupon he counts, and hath mistaken, and being upon that, the Court will not adjudge for him; and here is a misrecitall, for he recites the Statute which is, That none shall report or publish de Magnatibus aliqua nova mendacia, seu alias res, unde discordia aut aliqua lis (Anglice debates) inter Magnates, vel inter Magnates & Communitatem dicti Regni oriri possint whereas the Statute is, whereof discord or slander may arise within the said Realm, so as there is a misrecitall and variance betwixt the words, debates for slaunder, which is a variant word; and the words within

10. Ley 82. Jones 194.

3 Cr. 906.

Pl. Com. 79. a.

Pol. 232.

in the said Realm varies from the words inter Magnates & Communitatem hujus Regni. Secondly, because it is not shewn, That he was unus Magnatum at the time of the speaking of the words, as the President is in the Lord Cromwells Case; For it may be that he was created Vicount or Baron after the speaking of the words, And it shall not be intended, That he was a Vicount before, unless it had been averred, That he was then a Vicount: But the Court resolved in both points for the Plaintiff: For they all agreed, if the mis-recital or variance had been in the purview or substantial part of the Act, as mis-reciting the time of the making, as in Partridges Case, or in the body of the Act, as in the Lord Cromwells Case, Nuncia pro mendacia (which is another word, and of another sense, and in the body of the Act) such variance had been good cause to stay the Judgment; but here they conceived there is not any material variance; for in the first part of the Act is debate *vel discordia*, and in the last part discordia vel *dissaunder*, which in the intention of the Makers of the Statute be all one: Also it is in the *percloſe* unde discordia, &c. which is but the consequence of the words, or the evil effect ensuing thereupon; and false words and lyes are principally prohibited in that Statute. And the second variance is of the same condition, not material in substance; wherefore for such the Court shall not stay Judgement. For the second exception, all the Court held the declaration to be good enough; for there is sufficient demonstrance in the declaration, That he was a Vicount at the time of the speaking, for he nameth himself Vicount, and recites the Statute, and that the Defendant not regarding the Statute, spake those words of the said William Vicount Say and Seal; and it cannot be spoken against the said William Viscount, unless he had been then a Vicount; and the Law doth not intend, That he was a Vicount of another Realm, for of them our Law doth not take any cognisance. And whereas it was objected, That there were not any Vicounts in King Richard the seconds time, so as the Statute cannot extend unto them: It was answered, True it is, there were not then any Viscounts; For in the eighteenth year of King Henry the sixth, was the first Viscount, and in the one and twentieth year of the said King was the question for their seats in Parliament: Yet the Statute is de Magnatibus Regni Angliæ, and every Viscount is a Baron, which is an addition of honour. By another reason it appears, That he was then a Viscount; For the speaking is alledged to be, to such a Servant of the said William Viscount Say and Seale, and she cannot be Servant to a Viscount, unless he were then a Viscount; also the words themselves are, Thy Lord is a Traytor; which prove, That he was a Lord at the time of the speaking; And when he names himself Viscount in so many places, To averr afterwards that he was a Viscount, had been idle and superflous: But where a Justice of peace or other officer brings an Action for slanderous words spoken

2 Cr. 362.

Co. Lit. 69.

words spoken of him in his office or place, there of necessity he ought to shew, That he was then a Justice of Peace, or such an Officer wherein he was slandered; yet if he shews that which *tant amount*, it sufficeth; as that he had been a Justice of Peace for divers years; or for two years, and the speaking is alledged to be within the year, that is sufficient; yet it may be that the Commission is renewed; but it shall not be intended; Whereupon Judgment was given for the Plaintiff. Vide postea pag. 142.

Baylye *versus* Hughes Trin. 4. Car. rot. 738.

DEbt, for forty shillings and six pence, and declares, That Sir Henry Brown by Indenture let to J. S. for two hundred years, rendring thirty one shillings per annum, at the Annuntiation and St. Michael by equal portions, and conveys the reversion to him as Assignée, and for fifteen shillings six pence for rent behind for one year, ending at the Annuntiation last past, and for twenty five shillings for money lent, he brings this Action; The Defendant pleaded quoad the twenty five shillings non debet, and quoad the fifteen shillings six pence, That the said Sir Henry Brown demised the said lands, rendring rent prout, and by the same Indenture covenants for himself, his Heirs and Assignes, with the Lessée his Executors and Assignes, That if he be disturbed for respite of Homage, or be inforced to pay any charge or issues lost, That he shall withhold so much of this rent, as he shall be inforced to pay; And shews, That by a Writ issuing out of the Exchequer for respite of Homage and Issues lost, so much was levied by the Sheriff, which he hath withheld of his said rent; And upon this Plea it was demurred in Law, and the principal question was, Whether the Assignee of a Term shall have remedy upon a Covenant by way of Retainer, against the Assignée of a reversion? Secondly, because the Defendant doth not shew, That the land was held in capite, or that Homage was due, or the Issues duly levied; And after these matters moved at the Barr, Whistler for the Defendant argued, That the Assignée should have the benefit of this Covenant by the Common-law, and if not, That he was clearly within the Statute of tricesimo secundo Henrici octavi; And for the other matter, the Plea is good; for if he be distrained or agrieved for the Homage or Issues, he may detain his rent; but then he took exception to the Declaration, for that the Plaintiff demanded fifteen shillings six pence for rent, for a year, ending at the Annuntiation, and the entire rent was one and thirty shillings; so that what he demanded was but rent for half a year, and he doth not shew that he was satisfied for the residue; and therefore the Declaration ill, Which was held by the Court to be an incurable default: Whereupon the Record being viewed, and found so, rule was given, That Judgment should be for the Defendant; That the bill should abate; and no more was spoken at the Bar, But the Court conceived

11. Jones 242.

Co. Litt. 215. a.

Jones 242.

Ants 104. 436.

Post. 503.

conceived, That the Aſſignee of the Term ſhould have the benefit of this Covenant. For it runs with the land; and at the Common Poll. 503. Law he might have taken advantage to detain the rent reſerved upon the Leaſe for years; For it may be appointed to ceaſe at the will of the parties.

Crane *verſus* Holland, Paſch. 4. Car. rot. 294.

12. Jones 193. ERror of a Judgment in Northampton, becauſe in Northampton the Court being held before the Major and two Bayliffs, the Venire facias upon the Iſſue was awarded to the two Bayliffs, to return a Jury before the Major and Bayliffs, ſecundum conſuetudinem: Which being returned, and Judgment given, the Error aſſigned was, Becauſe the Bayliffs being Judges of the Court, could not alſo be Officers, to whom proceſs ſhould be directed; there being no cuſtom that can maintain any to be both Officer 3 Cr. 76. and Judge. But all the Court (abſente Hide) conceived it might 2 Cr. 178. be good by cuſtom, and that it is not any Error; For the Judges be not the Bayliffs only, but the Major and Bayliffs; And it is a common courſe in many of the ancient Corporations where the Bayliffs are Judges, or the Major and they be Judges; yet in reſ- 3 Cr. 76. pect of executing proceſs, they be the Officers alſo; and one may be Judge and Officer diverſis reſpectibus, as in rediſſeiſin, the Sheriff is Judge and Officer; Whereupon the Judgment was affirmed.

Skevill *verſus* Avery.

13. TReſpaſs of Aſſault, Battery, and Wounding, The Defendant pleaded to the Wounding Not Guilty; To the Aſſault and Battery he pleaded, that he was poſſeſſed of an Houſe in ſuch a Pariſh for years, And that the Plaintiff entred his Houſe, and would have thruſt him out of poſſeſſion thereof, whereupon he moliter manus impoſuit, to put him out, and the harm, if any done, was in defence of his own poſſeſſion: Hereupon the Plaintiff demurred; and Goldſmith for the Plaintiff ſhewed for cauſe, That the Defendant had pleaded a Leaſe for years, not ſhewing who made the Leaſe, nor when it was made, nor for how many years, whereas they ought to have been pleaded ſpecially, and ſhewn particulatim: For if it be traverſed, there cannot be any Iſſue thereupon; and he relyed upon Crogats Caſe, Coke 8. Rep. fol. 66. 2 Cr. 86. That de injuria propria is no Plea: But all the Court held, 123. 673. That the Defendant had well pleaded; for ſaying, That he was Hob. 218. poſſeſſed for years, is but an inducement and conveyance to his juſtification, and not the ſubſtance thereof, which is, That he offered to thruſt him out of the poſſeſſion of his Houſe, and whatſoever Title he hath, it is not material; for if he were in poſſeſſion by virtue of a Leaſe at Will, or any other Title, de injuria ſua propria is a good Plea: For the Title or Intereſt not coming in queſtion

(and

(and what was pleaded or alledged, being but an inducement to the Plea) it needs not be so certain, as where it is pleaded by way of title, to make a claim in the Defendant. Whereupon it was adjudged for the Defendant.

Shutford. *versus* Penow. Trin. 4. Car. Rot. 770.

Assumpsit. Whereas the Defendant had a Dog which used to kill sheep, and knowing thereof, and that his Dog had killed the Plaintiffs sheep, and having notice that the Plaintiff intended to sue him for recompence, he thereupon intreated the Plaintiff not to sue him, and to make what benefit he could of the sheep so killed: And in consideration that the Plaintiff would desist his Suit, and make such benefit as he might of the said sheep, the Defendant, the first day of May anno decimo octavo Jacobi Regis, promised the Plaintiff to recompence him the damages which he sustained by the killing of the said sheep: And alledgeth in facto, That he thereupon desisted from his intended Suit, and that he endeavoured to make what benefit he could of the sheep so killed, but could not make any; And that he was damnified by the killing of them four and forty shillings. And that upon the first day of May anno secundo Caroli Regis, he requested the Defendant to recompence him for his damages sustained, and the Defendant refused; whereupon he brought this Action: The Defendant pleaded the Statute of vicesimo primo Jacobi, capite 16. And that this Action lies not by the said Statute, being grounded upon a promise made above six years since; whereupon the Plaintiff demurred. And after argument at the Barr by Rolls for the Plaintiff, and by for the Defendant, it was adjudged, That the Action was well brought within the time limited: For although the promise was made in anno decimo octavo Jacobi Regis, yet there was not any cause of breach thereof, nor ground of Action against the Defendant until request to make recompence: For until such request, he did not know what to pay, nor was there any due; For the duty ariseth upon the request, and the non-payment after the request is the cause of the Action. As Assumpsit to pay such a summ, if he marry A.S. or upon such persons return from Rome upon request; there it is not due, nor is there cause of Action, until the Marriage, or return from Rome, and the request made. And although the promise was made ten years before, yet the cause of Action is the non-payment upon request, after Marriage, or return from Rome, and not before: And if the Action be brought within the time of the Statute after the breach, it is well enough; Whereupon it was adjudged for the Plaintiff.

14. Godb. 437. Jones 194. Hutt. 107.

Ant. 175.

Ant. 35.

Lewknor *verſus* Cruchley and his Wife, Paſch. 4. Caroli.

15. Jones. 195. 1 Rol. 50.

ACtion for words ſpoken by the Wife of Cruchley. For that the Defendant ſaid of the Plaintiff, John Lewknor (innuendo the Plaintiff) and John Smith (innuendo one John Smith) Knowing that *J. S.* a Goldſmith did carry with him a great deal of Plate, did lay wait to robb him, and ſet upon him by the high way, but he raiſing the Country, they did fly away, & *Lewknor* loſt his horſe, & they both were driven to ride away upon one horſe. Upon Not guilty pleaded, & Verdict for the Plaintiff, it was moved in arreſt of Judgment by Gardiner, That an Action lies not for theſe words: For it appears by his own ſhewing, That there was not any Felony committed; and he doth not charge him with Felony, but with a Miſdemeanour, as it were a Riot, and is no more than if he had charged him with committing a Riot; and it is but with an intent to do it; and therefore for theſe words an Action lies not. Coke 4. Rep. fol. 16. Eaton and Allens Caſe, for ſaying, He is a Brabler & Quarreller, for he gave his Champion counſel to make a Deed of gift of his goods to kill me, & then to fly out of the Countrey, but God preſerved me; It was adjudged that the Action lies not; For

Co. lib. 4. 19. b.

he did not do any Act, but it is matter of intent which cannot be known: But all the Court delivered their opinions ſeriatim, That

1 Rol. 50. Poſt. 337. Yelv. 90.

the Action well lies: For although he chargeth him with an act which is not Felony, yet he chargeth him not only with the intention, but with a fact, which is as near to felony as may be, and is ſuch an offence which is more than intent only, and more than riot, and for which, Fine and Impriſonment are due: And Jones cited one Wicks Caſe, That the Defendant ſaid Nine perſons ſet upon me to have robbed me, and you (innuendo the Plaintiff Wicks) was one of them, adjudged, That the Action well lay; Whereupon Judgment was given for the Plaintiff.

Lawe *verſus* Harwood, Mich. 3. Caroli rot. 336.

16. Ley 82. Jones 196.

ERror of a Judgment in Windſor, in an Action upon the Caſe for ſlandring his Title. The Plaintiff declares, whereas he was ſeiſed in fee as Copyholder of Lands in D. within the juriſdiction of the Defendants Court, That the Defendant ſaid, He had not any Title to thoſe Lands. The Defendant juſtifies, and iſſue thereupon, and found againſt the Defendant, and damages aſſeſſed to ten ſhillings, and ſix pence coſts: And the Court increaſed the coſts to three pounds, and Judgment given accordingly. The firſt Error aſſigned was, That the declaration was not good, becauſe he did not ſhew, That by the occaſion of thoſe words he had any prejudice, as that he was bargaining for the Inheritance

2 Cr. 358.

with any, or for a Leaſe, or any other ſpecial prejudice. The ſecond Error was, becauſe damages being found but at ten ſhillings, he

he might not by the Statute of viceſimo primo Jacobi, capite decimo ſexto, have more coſts than damages. As to the firſt Error aſſigned, all the Court agreed, That the declaration was not good, and ſo the Judgment was erronious; becauſe the Action is not maintainable, without ſhewing ſpecial prejudice. No more than for calling one Whore or Baſtard whithout ſhewing ſpecial cauſe of temporal damages, as in Anne Davies Caſe, Lord Coke 4. Rep. fol. 16. And it is not like to words ſpoken, which imply ſlander and temporal loſs, as Thief, Bankrupt, or ſuch like; but ſlandring of ones Title doth not import in it ſelf loſs, without ſhewing particularly the cauſe of loſs, by reaſon of the ſpeaking the words, as that he could not ſell or let the ſaid Lands; but being general words, they be not ſufficient, Vide Coke 4. Rep. fol 17. James his caſe, and fol. 18. Oxford and his Wife againſt Croſs. To the ſecond Error aſſigned, all (except Hide, who ſeemed to doubt thereof) held, That the Action is out of the Statute of viceſimo primo Jacobi, as well for the time of limitation, as for the coſts; for that extends to Actions for ſlanderous words, which be intended to the perſons of men, and are common Actions, and rather begin of ſpleen then otherwiſe; but not to this Action, which is rare, and not brought without ſpecial damage. But for the firſt cauſe the Judgment was reverſed. Co. Lib. 1. 177. Poſt. 163. R 453.

Hughs *verſus* Farrer.

17. Jones 197. 1 Rol. 45. Poſt. 282.

ACtion for words. Thou art a Witch, and didſt bewitch my Mothers drink: And being afterwards deſired to know, why ſhe called her Witch, ſhe anſwered, if I called her Witch, we will prove her a Witch, and anſwer what we have done. Upon Not Guilty pleaded, and Verdict for the Plaintiff, it was moved in arreſt of Judgment, That for theſe words an Action lies not, becauſe they were general words, and ſhew not any ſpecial hurt to the drink: So not within the Statute of primo Jacobi, capite duodecimo, if there be no hurt to the perſons or goods: But all the Juſtices beſides Witlock, conceived, That the Action well lies; And it was adjudged for the Plaintiff. Poſt. 282. Yel 150. 1 Rol. 45.

The Lady Cavendiſh *verſus* Middleton, Trin. 4. Car. rot. 243.

18. Jones 169. 1 Rol. 106.

ACtion upon the Caſe. Whereas the ſaid Lady by Ralph Buck her Servant, having bought of the Defendant twelve Beaſts for fourſcore pounds, paying for them twenty pounds in hand, and was to pay ſixty pounds reſidue at the end of the Moneth, which twenty pounds the ſaid Ralph Buck immediately paid, and the ſixty pounds reſidue he paid for the Plaintiff to the Defendant at the end of the Month, and after dyed. That the Defendant, after the ſaid Bucks death, demanded of the Plaintiff again the ſaid ſixty pounds, affirming it was not paid unto him: Whereupon the Plaintiff

Plaintiff fidem adhibens to his assertion, paid unto him the said fifty pounds ubi re vera he had received it before. And upon this deceit the Action was brought; and Serjeant Crew moved in arrest of Judgment (after Verdict upon Not Guilty pleaded, and found for the Plaintiff) That this Action lies not; but she ought to have brought an Action of account, as for money unduly received: But all the Court conceived, That the Action well lies, although the Plaintiff might have brought an Action of account; Whereupon it was adjudged for the Plaintiff.

Post 503. 3 Cr. 644. 1 Rol. 106.

Viscount Say and Seal *versus* Stephens, ante pag. 135.

19. Jones 195. 3 Cr. 294.

THe said Viscount having had Judgment to recover, a Writ of Error was brought to remove the Record into the Exchequer-Chamber, upon the Statute of vicesimo septimo Elizabethæ, capite quinto, which gives Writ of Error upon a Judgment given in Actions upon the Case, Debt, Detinue, Covenant Account, Ejectione firmæ, or Trespass, first commenced there where the Kings Majesty shall not be a party. It was moved, That the Writ of Error is not allowable, because it is given in seven several Actions there enumerated, & is not allowable in any other Action, as in Replevin, Scire facias &c. And although it be here termed an Action upon the Case, yet it is more than an Action upon the Case, for it is in a far higher degree, and founded upon the Statute of secundo Richardi secundi, and is for the King and party; and of that opinion were Hide chief-Justice, Jones and Whitlock, That this Action is out of the Statute; For the Statute is to be intended in Actions upon the Case, and not in other Actions, nor to this Action, which is Scandalum Magnatum, and grounded especially upon the Statute. And the Statute of vicesimo septimo Elizabethæ being to alter the course of the common-Law, ought not to be extended to other Actions than what are mentioned in the Statute: And it was said, That after the said Statute, no Writ of Error hath been brought upon such Actions: And it is intendable, That if a Writ of Error might have been brought, it would have been practised before these times: But the other objection, That it was brought by the King and the Party, was not much regarded; for so are Actions upon the Case for the King and the Party, and debt for not setting out Tythes; yet it is a common course upon those Actions to have Writs of Error, in the Exchequer-chamber: And it was said, That if the Lords in Parliament had intended, that this should be examined by a Writ of Error any where but only in Parliament; they peradventure would not have agreed unto it. But I doubted thereof, and delivered not any opinion; for I conceived it more proper to have it disputed in the Exchequer-chamber, when the Writ of Error shall be returned, as it hath been in other Cases, where

2 Cr. 171.

Post. 535. 163.

Post. 286.

Co. lib. 1. 87. b. Co. Litt. Sect. 108.

R. 254.

where a Writ of Error hath been brought upon a Scire facias, and been adjudged there, That it lies not: Then for us to dispute it, being a matter of our own judging. Post. 286. 300.

Long *versus* Nethercote, Trin. 4. Car. rot. 43.

ERror of a Judgment in Sudbury, in debt upon a Lease for years, by the Assignée of a Reversion. The first Error assigned was; For that the Court is held by virtue of letters Patents of Queen Mary, and the process is awarded secundum consuetudinem Curiæ, which cannot be by custome, where the Court is erected within time of memory. The second Error assigned, was, Because the Action of Debt is brought supposing a demise in Sudbury, of Lands in D. in the County of Essex, whereas it ought to be brought in Essex, being brought upon the privity of Estate, and not upon the Contract, the Plaintiff being Assignée of the Reversion; For where the Action is brought by the Lessor upon the privity of Contract, it was said, the Action might be brought where the demise was made, although the Land be in another County, and is well enough: But where the Action is brought by one as Assignée of a Reversion, it ought to be brought in the County where the Land lies, & not where the demise was made. The third Error assigned was, Because he claims by grant of a Reversion, and doth not shew, That it was by Deed; and without a Deed or Fine a Reversion cannot pass. And for the first and third Errors principally, the Judgment (not being upon Verdict but upon demurrer) was reversed. 20. R. 397. Post. 184. Pl. Com. 150. a

Darrose *versus* Newbott.

ERror of a Judgment in Bridgwater. The Error assigned was; For that in an Action upon the Case *Sur* Assumpsit, the parties being at Issue, a demurrer was joyned upon the evidence, and thereupon the Jury discharged, and afterwards Judgment was given for the Plaintiff, and a Writ of Enquiry of damages awarded, and damages found, and Judgment thereupon. Where the Jurors which came to find the Issue, although by the demurrer they were discharged of the Issue, yet ought to have assessed damages conditionally, if Judgment should be given for the Plaintiff: And in proof thereof was cited Scholasticas Case, in Plowd. Comm. fol. 408. and the old book of Entries fol. 146. in Demurrer 12. & 13. & ibidem 237. *Forger de faux faits* 11. And it was said by the Court if these presidents be good Law, then it may be inquired of by the same Jury conditionally: But it may be as well enquired of by a Writ of Enquiry of damages, when the Demurrer is determined, and the most usual course is, when there is a Demurrer upon evidence to discharge the Jury without more enquiry, Vide old book of Entries fol. 551. Trespass *in Arser* 1. 21. Ant. 32. 33. Co. Lib. 10. 119. Post. fol. 153.

Sir

Sir Humphry Tuſton and Sir John Aſhleys Caſe.

22. Poph. 180.

IN a quo warranto againſt the Corporation of Maydſtone, for claiming divers Liberties in the Village and Pariſh of Maydſtone (in which Pariſh one houſe called the More, wherein Sir Humphry Tuſton inhabited, and a great houſe called the Arch-biſhops Palace, which was conveyed to Sir John Aſhley were ſituated) a Judgment was entred by diſclaymer, with conſent of the parties, virtute vel prætextu literarum Patentium, gerent. date, anno decimo ſeptimo Jacobi Regis. But becauſe theſe words Gerent. date, anno decimo ſeptimo Jacobi were in the Margent, and by reaſon of a ſtroak made croſs the ſaid words, the Clerk had omitted them in the ingroſſing the Judgment (which was entred upon Record anno ſecundo Caroli Regis.) It was now moved this Term, That thoſe words might be interlined, and the Record amended; but it was much oppoſed by Sir Humphry Tuſton and Sir John Aſhley whom the Cauſe concerned, by Serjeant Henden and Mr. Noy, who were of Counſel for them: For they ſaid, That albeit it is true, that they were omitted by the negligence of the Clerk, and the Paper-book was fair, without interlineation or croſſing, yet it cannot be amended, being in another Term, much more in another year, eſpecial in the Kings Caſe; and that none of the Statutes of amendments extend to Caſes of quo warranto, or Suits where the King is party; and that the amendment will alter the Record in ſubſtance; For whereas their Suit was to be freed from thoſe Liberties by *monſtrans* of any Charters: Now by this amendment they be freed only from Liberties claimed by the Charter of decimo ſeptimo Jacobi, whereas there were other Charters pretended, viz. in anno ſecundo Elizabethæ, from which they deſired to be freed. But upon great examination of this omiſſion, and upon certificate of the Attorney-General, That theſe words omitted, viz. Gerent. date, anno decimo ſeptimo Jacobi were inſerted by him with his hand, and written in the Margent of the Paper-book in the ſide of the book, and that it was intended by the parties, That this diſclaimer ſhould not extend further, than to liberties granted by the Charter of decimo ſeptimo Jacobi, and not to liberties granted by former Charters, and that the ſtroak which was made croſs the ſaid lines was uncertain, whether voluntarily done, or when done. And upon examination of divers Witneſſes, That ſuch was the agreement, it was held by all the Court, to be amendable, by the courſe of the Common-law, as well in another Term, as in the Term when it was entred, and as well in the Kings Caſe, as of a common perſon: And being meerly a miſpriſion of the Clerk, by the miſguiding of the Paper-book by the examination of all the circumſtances, it is no more than when a ſpecial

a ſpecial verdict is miſ-entred, which is rectified by the notes of the Clerk of the Aſſiſe; whereupon it was awarded to be amended, and was amended accordingly.

Kendal *verſus* Fox.

EJectione firmæ. Upon a ſpecial verdict the Caſe was, That Nicholas Kendall and Lowda his Wife, being joyntly ſeiſed by purchaſe during the Coverture for their lives, Remainder to Walter their eldeſt Son in tail, Remainder to William their Son in tail, Remainder to the right Heir of Nicholas: Afterward Nicholas by deed with Letter of Attorney, infeoffs the ſaid William and his Wife, and the Heirs of the body of William, Remainder to the right Heirs of the ſaid Nicholas, with warranty againſt all perſons; and after levies a Fine to two Strangers of the ſame land to them and their Heirs, with warranty againſt all perſons; and they render it to him for a Week, Remainder to the ſaid William and his Wife, and to the Heirs of the body of William, Remainder to the right Heirs of Nicholas; afterward Nicholas dyes, Lowda the Wife enters and dyes, Walter the eldeſt Son enters, William and his Wife enters, and lets to the Plaintiff: The paincial queſtion was Whether this warranty made by Nicholas upon the feofment, being a collateral warranty, and deſcending upon Walter the eldeſt Son, be totally avoided by the entry of Lowda? And whether the Remitter of the *Feme* be alſo Remitter to Walter, and the warranty diſcharged? And it was held, That it was not; for the warranty being deſcended, and attached before the entry of the *Feme*, although ſhe be free and not bound by the warranty, yet he in Remainder being bound, that *Eſtops* the Remitter, Vid. 44. Aſſ. 35. 44. Ed. 3. 30. and upon the firſt argument by Maynard for the Plaintiff and Calthrop for the Defendant, it was adjudged for the Plaintiff. 23. Jones 199. 2 Rol. 421. 747. Co. 1. 96. b. Co. Lit. 227. a Co. 10. 97. b

. . . . . .

ERror of a Judgment in a Quare Impedit for the Church of Leckhamſted; & therein the Judgment being for the Plaintiff, & the value of the Church found to be fourſcore pounds per annum, a Writ of Error being brought of the Judgment before the Exigi facias, and after the Record removed; And the Judgment being affirmed, and having depended a year and more, it was moved that according to the Statute of tertio Henrici ſeptimi, capite decimo, which appoints damages and coſts, and to be allowed where Writs of Error be brought pro delatione Executionis: The Court here awarded, That the Defendant in the Writ of Error ſhould have damages for a year (during which time the Writ of Error was depending) according to the value of the Church found by the verdict, which was 80. l. per annum, and they awarded him 80. l. beſides coſts according to the preſident in anno ſexto Edvardi ſexti, Dyer. 77 24. 3 Cr. 617. Poſt. 175. 401

Royſons Caſe.

25. ROyſon, Becauſe he offered himſelf to be bayl in an Action before Juſtice Whitlock (and upon his oath affirming himſelf to be a Subſidie man, and to be aſſeſſed four pound goods in the Subſidie book: Being further examined what he paid, and other queſtions, and confeſſing that he was not any Subſidie man) was by him committed, and the next day brought by the Marſhall into the Kings Bench, and being examined of this miſdemeanor, ſubmitted himſelf to the grace of the Court, and confeſſed that he had
2 Cr. 256. been Bayl in other Actions, and had ſworn that he was a Subſidie-man whereas he now confeſſed in Court, That he was not: For this cauſe he was preſently adjudged to be committed to priſon, and to ſtand upon the Pillory, with a paper mentioning his Cauſe, viz. For falſe Bayl, and to be brought to the Court of Kings Bench, Common-pleas and Exchequer: And this upon his confeſſion was recorded in Court, without other Proceedings againſt him.

Green *verſus* Guy.

26. INformation for the King and himſelf before the Juſtices of Aſſiſe in the County of Eſſex, upon the Statute of 21. Hen. 8. cap. 13. for non reſidency for eleven Moneths upon his Church of parva Thurrock in the County of Eſſex; The Defendant pleaded the ſaid Statute of 21. Hen. 8. cap. 13. That one who hath two Benefices ſhall be Reſident upon the one, and that he was lawfully preſented, inſtituted, and inducted, as well to the Vicaridge of Egware in the County of Middleſex, as to the Rectory of parva Thurrock, and that he was all the time in the Information mentioned Reſident upon his ſaid Vicaridge of Egware; and it was thereupon demurred, and the cauſe of demurrer was by Henden Serjeant alledged to be, For that he did not ſhew a diſpenſation, as Coke 4. Rep. fol. 119, Boytons Caſe cited there; but to that point no reſolution was given: For in regard this Information was brought
Ant. 112. before the Juſtices of Aſſiſe and *Oyer* and *Terminer*, and the Statute doth not give it, but only in the Kings Courts, where there may be *Eſſoygne*, *Gager del ley*, *or protection*; Therefore notwithſtanding the Statute of viceſimo primo Jacobi, capite quarto, which appoints,
Jones 193. That Informations taken by Enqueſt, before Juſtices of Aſſiſe, or of *Oyer* and *Terminer*, ſhall be determinable there. It was reſolved upon conference with the other Juſtices, That this Information lyeth not before them; And Judgment was given for the Defendant. Vid. Coke 6. Rep. fol. 19. Gregories Caſe, and 6. & 7. Eliz. Dyer, 236.

Termino

Termino Hillarii, anno quarto *Caroli* Regis in Banco Regis.

Sir William Withipoles Case, ante fol. 134.

THE first day of this Term William Withipole was arraigned upon an Endictment of Murder, found in this Vacation in Suffolk before Commissioners of *Oyer* and *Terminer* and certified hither by Cerciorare, and upon his arraignment he desired to have Counsel to plead for him Ore tenus, pretending he had matter in Law to plead; but the Court denyed it, unless he would shew unto them some exception in Law, for which they should see cause to appoint him Counsel; and then Mr. Holborn should be assigned for him (as the Court said any other might be, though not assigned.) Afterwards the said Mr. Holborn (being assigned his Counsel) moved, that he ought not to be arraigned upon this Endictment, because he had been *anter foits* arraigned upon an Enquisition of Murder, found before the Coroner, and had pleaded thereto, &c. and so concluded his plea, by pleading Not Guilty to the Felony. But it was held by all the Court, That this was no cause of plea; For where he is not convicted or acquitted he may be arraigned upon a new Endictment: But to avoid that doubt, that he should not be questioned upon both, it was ruled, That the first should be quashed as insufficient; then it was moved by Holborn. That one of those Endictors was outlawed in trespass. But because he had not the Record ready, and the Court conceiving it to be alledged by him in delay of Justice only; therefore the Court ordered him to answer; And he pleading Not guilty, they commanded to have a sufficient Jury to try him returnable Octabis Purificationis. 1. Jones 198. 9. R 10. 9. Post. 175. Post 365. Post. 175. Co. 4. 45. a Ant. 134.

Forger *versus* Sales

DEbt upon an obligation against the Defendant for an hundred pounds, as Son and Heir of Williams Sales, and declares, that William Sales, by his obligation here shewn, had obliged himself in two hundred pounds, &c. and omitted these words, which were in the obligation (Et ad eandem solutionem faciendum obligo me et Hæredes meos) the Defendant pleaded *Riens per descent*, & it was found against him, & now moved in arrest of Judge- 2. Jones. 199.

ment, That those words being omitted, it doth not appear the Heir was bound: But it was prayed on the other part, That it might be amended, because it was the meer default of the Clerk, who having the obligation before him, omitted those words, and the Clerk, being examined, confessed, That he had the obligation and instructions to draw it against the Defendant as Heir, and that it was a meer mistaking of himself; but Jones conceived it not amendable, R 81. because it is the substance of the declaration; as where one declares in the Debet and Detinet, where it ought to be in the Detinet only, as vicesimo secundo Edvardi quarti, folio vicesimo primo, it is not amendable; But my self and Whitlock conceived it to be amendable, it being meerly the default of the Clerk, when he had the obligation before him: And the Action is brought against him as Heir, and so he is termed in the obligation it self, and it is meerly the omission of the Clerk, which is well amendable: And Hide chief Justice inclined to this opinion; but to avoid further question, it was appointed to be amended by consent, and that the Defendant should plead de novo.

Audley *versus* Halsey, Hill. 3. Caroli rot. 943.

3. Jones 202. Post. 166. 176. 177.

ACtion *sur Trover* of Goods, on the twenty fifth day of November, anno tertio Caroli: Upon Not guilty, a special verdict was found, That one John Hill and Alice Squire were possessed of those goods, and used the Trade of Merchandize, and being so possessed, were bound to the Defendant, anno vicesimo primo Jacobi, in a Statute, acknowledged according to the Statute of vicesimo tertio Henrici octavi, capite sexto, for a true and just debt, and that being forfeited, he sued an Extent upon that Statute, tricesimo Octobris tertio Caroli, directed to the Sheriffs of London, & that they, by virtue of that Extent, tricesimo primo Octobris tertio Caroli, extended those goods (the Writ being returnable in Crastino Animarum) and returned the Writ and Enquisition into the Chancery, That the third of November, tertio Caroli, the said John Hill and Alice Squire became Bankrupts, being indebted to the Plaintiff, and to divers others for true and just debts, That upon the sixt day of November tertio Caroli, the Defendant sued a Liberate upon that Extent, and those goods the same day were delivered by the Sheriffs according to the apprisement in the Extent, That afterward, viz. upon the eighth day of November, the Plaintiff and others sued out the Commission of Bankrupts, against the said Hill and Squire, and the Commissioners, by virtue of their Commission, sold those goods to the Plaintiff upon the three & twentieth day of November tertio Caroli, and that the Defendants afterward, viz. the twenty fifth day of November the same year, converted them, &c. Et si super totam, &c. And it was argued several dayes at the Bar, and the sole question was, Whether John Hill and Alice Squire becoming Bankrupts after the Extent, and before the Liberate, the sale

sale of the Commissioners unto the Plaintiff, after the goods delivered upon the Liberate, be good; And it was argued by Noy and Farrer for the Plaintiff, That this sale is good; For notwithstanding this Extent, the property of the goods remain in the Conusors, and by the Extent are only seised into the Kings hands, but that shall not divest any property from the Conusors; for they be but as it were in protection of the King, and then, when the Conusors become bankrupts before the Liberate, those goods are in the power of the Commissioners to sell and distribute amongst the Creditors; And they relyed especially upon the book of tertio Edvardi sexti; Dyer 67. where goods being extended, yet were subject to be seised for the Kings debt: And they also relyed upon the Statute of decimo tertio Elizabethæ, capite septimo, and chiefly upon the Statute of vicesimo primo Jacobi, cap. 15. whereby is proved, That the Commissioners may sell goods or lands, notwithstanding Judgments, Statutes, Executions, or Extents, not served or executed, and that they said was not done untill the Liberate, otherwise there would be a mischief: For then there may be an Extent, and no Liberate be sued after upon it, as the book of tricesimo primo Henrici sexti, Brooke Statute 41. But all the Court resolved, and severally delivered their opinions, That those goods, extended before they became Bankrupts, and delivered by the Liberate after they became Bankrupts, could not be sold by the Commissioners, because they being extended, are quasi in Custodia Legis so as the Conusors have not any power to give, sell, or dispose of them; and although by the Extent the Conusee hath no absolute interest nor property in them, untill the delivery by the Liberate, and at the return of the Writ, may refuse them for being over valued, yet that is for advantage of the Conusee: For the Extent is Capias in Manus nostras, ut eas liberari facias, and they be as goods gaged or distrained, which cannot be forfeited by outlawry, or taken in execution from the party who hath them in gage, or by way of distress, without payment of the mony, Vide tricesimo Henrici sexti, folio decimo; vicesimo secundo Edvardi quarti, folio undecimo; tricesimo quarto Henrici octavi, Brook pledges 28. and decimo tertio Richardi secundi, Brook pledges: For the goods are bound by the Teste of the Writ of Extent or Execution sued, as secundo Henrici quarti, folio decimo quarto; quarto Henrici sexti, folio quinquagesimo octavo, and Coke 8. Rep. fol. 171. the goods are bound by the execution suing, but the land is bound by the Judgment, and by the Extent they are to be taken by the Conusee, and it is good against the Conusor: And the Case here is stronger, for that the Extent is returned before they became Bankrupts, and the delivery by the Liberate was before the Commission of Bankrupts was sued out; and it is not like unto the Case of tertio Edvardi sexti, Dyer 67. For there although the goods were extended, yet they were not delivered to the Conusee, and the Writ was not returned; and the Writ of privi- ledge was for debt due to the King, wherein the King hath his prerogative

R. 344.

3 Cr. 47. Jndg. Res. 124.

Post. 177.

Pl. Com 62. b

2 Cr. 451.

Hob. 339.

rogative by the Common-law: And yet it is said there, That others were of a contrary opinion: Also when the Writ of Liberate is such, it hath relation to the Writ of Extent, and they be quasi but one Extent; and the goods are so bound by the Extent and Apprizement, that the Conusor hath not any more property in them, but secundum quid, and not simpliciter; that is, if the Conusee refuse to accept them; for it is a conditional Writ to deliver them to the Conusee, if he will accept them, and when he accepts them, they are bound ab initio. And Jone, cited a Case, anno decimo nono Jacobi in the Common-Bench, betwixt Brumpsted and Bathurst, where an under-Sheriff took an obligation for his fees, for an Extent serving before the Liberate: It was held not allowable but he ought to have stayed untill the Liberate. And whereas it was objected, That the Writ is not served nor executed untill delivery of the goods upon the Liberate, and therefore the Commissioners had power of them, They all conceived, That the Statute being with an exception, Where Execution or Extent is served or executed, That this is to be accounted the executing of an Extent, when the goods be apprized, and the Writ returned; but so long as they remain in the hands of the Conusors, they may be sold as but when they are delivered by the Liberate, the Commissioners have no power to meddle with them. And it was said, That the Statute of vicesimo primo Jacobi provides, that goods attached by foraign Attachment in London, shall be sold by Commissioners which proves, That after the Statute of decimo tertio Elizabethæ, untill the Statute of vicesimo primo Jacobi, the Commissioners had no power to meddle with goods taken upon a foraign Attachment, yet they are but as a Pledge to draw the party to answer; and if he appear, the foraing Attachment is discharged; Wherefore this Extent being returned served, the goods be not subject to other Executions, nor to the power of the Commissioners; And it was therefore adjudged for the Defendant.

Post 282. Winch 20. 50. Latch. 20. 52. Hutt. 52.

Bach *versus* Gilbert.

4. ERror upon a Judgment in the Common Bench in an Ejectione firmæ. The Error assigned; For that Jane Herlakenden apud D. demised an house and forty acres of land in D. per nomina omnium messuagiorum terrarum & tenementorum suorum in Parochia de D. seu alibi in Comitat. Canc. Upon Not Guilty pleaded, the Plaintiff surmised, That the said Parish of D. is in Rumney within one of the Cinque Ports ubi Breve Domini Regis non currit; and that Allington is the next Village adjoyning thereto in the County of Kent; and prayed a Venire facias upon it: and thereupon a Venire facias was awarded de vicineto de Allington, and by them it was found for the Plaintiff: And it was now assigned for error, That this Venire facias was mis-awarded, and a Mis-tryal not aided by the Statute; for the surmise ought to have been, That

That D. is within the Cinque-ports, and not that the Parish of D. is within the Cinque-ports; for D. may be a Village of it self, and the per nomina omnium terrarum, &c. in Parochia de D. may be the same place; But the Court held, That the Vill and Parish are intended all one, unless the contrary be shewn, and that it is no error; Wherefore rule was given, That the Judgment should be affirmed. Co. 11.25.2d. Co. 6. 14.b. 2 Cr. 120.265. Co.Litt. 125.b.

Jenks *versus* . . . . . .

DEbt upon an obligation against the Defendant as Brother and Heir to J. S. The Defendant pleaded *Riens per discent* from his said Brother, and issue being thereupon, a special verdict was found, That the Obligor was seised in fee of such lands, and had Issue, and dyed seised, and the Issue dyed without Issue, whereupon the lands descended to the Defendant, as Heir to the Son of his Brother; Et si super totam, &c. And after argument, it was adjudged for the Defendant: For although he is chargeable as Heir upon this bond, yet he is but a collateral Heir, and it ought to be specially declared, and the Issue ought to be joyned accordingly; but upon this Issue it is found against the Plaintiff; for the Defendant hath nothing as immediate Heir to his Brother, but by discent from the Son of his Brother; and if he would charge him, he ought to have made a special declaration; Wherefore it was adjudged for the Defendant. Pl. Com 441.a. 2 Cr. 186. Dier. 368. a.

Termino Paſchæ, anno quinto *Caroli* Regis, in Banco Regis.

James Hyott *verſus* Hoxton & Broughton.

ERROR in Banco Regis. Upon a Judgment in Audita Querela in the Common-pleas by Hoxton and Broughton ſurmiſing, whereas they were bound in a Statute, acknowledged before the Major of Hereford to Hyott, and he ſued Execution upon that Statute, and thereupon the ſaid Hoxton was taken, and let at large by the Sheriff of Salop, with the aſſent of the ſaid Hyott, whereby they were to be diſcharged of any other Execution againſt them; that notwithſtanding the ſaid Hyott to ver the ſaid Hoxton and Broughton minus juſte, by virtue of an Inquiſition found before the Sheriff of Salop, and the Sheriff of Hereford, ſuch a day and year, the Lands and Goods mentioned in the Inquiſition eidem Jacobo deliveravit, where it ought to have been by the two Sheriffs deliberari procuravit, otherwiſe it is inſenſible that the Plaintiff ſhould deliver to himſelf. And this was aſſigned for Error, That the declaration was inſufficient, it not appearing that the ſaid Goods and Lands ſo extended, were delivered by any Sheriff, but by the party himſelf, and ſo much the rather, becauſe the Judgment being, that they ſhall be reſtored to what they loſt, it doth not appear what they loſt, nor what was delivered in Execution: But all the Court conceived it to be no error; for the Writ is good enough, which ſhews ſufficient cauſe of diſcharge: And comprehending that he is minus juſte grieved, by delivery of their Lands in extent, it is ſufficient without other declaration: And when the declaration is good in point of the cauſe of diſcharge; although the matter be ill in point of aggravation of damages, yet the writ being good, and the Iſſue taken upon the cauſe of diſcharge, and found for him, the Judgment is good: For the default in the declaration is not material; and to that objection, that being uncertain, it cannot be referred to enquire what was loſt or taken in execution. That may very well be ſupplyed by the writ of Enquiry of what damages, &c. And ſo this writ being found, he may be reſtored; whereupon the Judgment was affirmed, Coke book of Entries fol. 234. 1. Ante. 75. Poſt. 240. Ant. 143.

Beare *verſus* Woodley.

2. Jones 207. A Vowry. Upon demurrer, the Caſe was J. S. grants a rent of fourteen pounds per annum out of ſuch Land, *habendum* ſeven pounds *per annum* for thirty eight years, if *J. D.* live ſo long, payable at Michaelmas and the Annuntiation; and *habendum* the other ſeven pounds *per annum*, to begin after the death of *Woodley* for thirty eight years, payable at the ſaid two Feaſts and if it happen that the ſaid rent of fourteen pounds to be behind, That he may diſtrain; And whether this was one entire rent, or ſeveral rents was the queſtion? For that it is but one grant of fourteen pounds in the beginning, and the diſtreſs is limited for fourteen pounds, ſo it is entire alſo in the diſtreſs: But all the Court reſolved, that they were ſeveral rents, becauſe they have ſeveral beginnings and ſeveral endings; and although it be mentioned to be but one in the clauſe of diſtreſs, yet that is to be intended diſtributive to each part thereof; whereupon it was adjudged againſt the Avowant, Vide 17. Ed. 3. 75. 17. Aſſ. 10. 14. Eliz. Dyer 308. Coke 5 Rep. fol. 54. 55.

Goſhawke *verſus* Chiggell.

3. Jones 205. Ejectione firmæ. Upon a ſpecial verdict the caſe was, One Crogate was poſſeſſed of a Leaſe for a thouſand years of the Tenements in queſtion, and by deed poll granted all his Term, Eſtate, & Interſt therein, to *Heſter* his Daughter, *habendum* to the ſaid *Crogate* and his Wife for their lives, and after their deceaſe, to the ſaid *Heſter*; and if ſhe hath Heir of her body, then to her Executors and Aſſignes, provided, That ſhe ſhall pay to *Diana* her ſiſter, after the death of *Crogate* and his Wife, ten pounds *per annum* during her life; provided alſo, that if the ſaid *Heſter* died unmarried, having no Iſſue of her body lawfully begotten, That then this grant to the ſaid *Heſter* ſhould be void, and then *Diana* ſhould have the Term. It was found that Heſter was married, and died without Iſſue, Crogate and his Wife died, the Plaintiff claims by Leaſe from the Executors of Heſter, and the Defendant claims under Diana, and alſo by the Executors of Crogate; And whether the Plaintiff claiming as Executor to Heſter ſhall have it, was the queſtion? And it was argued by Griggs for the Plaintiff, and by Popes for the Defendant; And for the Plaintiff was urged, that this is a good grant of the term to Heſter, whereby ſhe was intereſted therein, and the Habendum is void; and the ſecond Proviſo for the determination thereof is not perform'd, becauſe ſhe did not die unmarried; and in that point the Proviſo is good, and the other part of the Proviſo is to no purpoſe (for ſhe cannot die unmarried and have Iſſue of her body lawfully begotten) and therefore is to be rejected; wherefore, &c. But all the Court, delivering their opinions ſeriatim, conceived

conceived the Plaintiff had not any title, but the Defendant had good title; for they agreed, That the grant was good, and the Habendum to the Grantor and his wife for their lives, and after to Hester is void, because it is repugnant to the Grant; but the Habendum shews the intent of the parties, That the Executors of Hester shall not have it, unless she be married, and hath Heirs of her body; and the Proviso (That if she die unmarried having no Issue of her body lawfully begotten, That it should be void) shall have this construction, That if she die unmarried, or married, having no Issue of her body (for she may not have lawful Issue, unless she be married) then it shall be void; for that is expounded by the Habendum, That he did not intend, That the Executors of Hester should have it, unless that she had Issue; so by this construction the words of the Deed stand together; and when it was found that she was married, and died without Issue, the Estate to Hester and limitation to her Executors is determined; whereupon rule was given, That Judgment should be entred for the Defendant, unless other matter were shewn, &c. Co. 1. 154. b. Co. 10. 95 a. Post. 400.

Wicks *versus* Shepherd, in the Exchequer.

ACtion for words. Whereas he was of a good fame, and a Suitor to such a woman, to marry her, by which marriage he was likely to have had a good preferment, and was in possibility to obtain her, that the Defendant maliciously, and to hinder him of this marriage, used these words to the said woman (in presence of others) of the Plaintiff, He is a sharking fellow, and getteth his living by deceit, & used himself violently to his former Wife, & denyed her necessaries; and is a needy fellow, and his conditions are wicked; and for his Religion, he is a Brownist: By reason of which words the said woman refused him, and he lost his marriage. The Defendant pleaded Not guilty, and found against him; and moved in arrest of Judgment, that these words are not actionable: But after argument, because it was shewn, that by reason of those words he had lost his marriage, it was held good cause of action, and adjudged for the Plaintiff; And afterwards Judgment was affirmed in a writ of Error in the Exchequer Chamber. And Sir Nicholas Hide, chief Justice, propounded it to Justice Jones, Justice Harvie, and my self, whether this Action was maintainable? And we all agreed, that the Action well lies for the loss which he hath by speaking those words, otherwise the words without such circumstances will not maintain an Action, as it is in the Case of Anne Davies, Coke 4. Rep. fol. 16. 17 a. 4. Post. 269. Co. 4. 17 a.

Salvin *verſus* Clerk, Hillary 20. Jac. rot. 466.

5. Jones 208. Lat. 64. 72. EJectione firmæ. Upon a ſpecial verdict the Caſe was, Alexander Sydenham was tenant in tail to him, and the Heirs Males of his body, the Reverſion in fee to John Sydenham his eldeſt Brother. Alexander makes a Leaſe for three lives with Warranty againſt all perſons, the Leaſe not being warranted by the Statute of triceſimo ſecundo Henrici octavi capite. 28. afterwards Alexander, anno decimo ſexto Elizabethæ, levies a Fine of thoſe Lands with Warranty againſt all perſons, and with proclamations to Taylor, under whom the Defendant claims, and afterward dies without Iſſue Male, having Iſſue Elizabeth, Mother to Poynts, Leſſor of the Plaintiff. After the death of Alexander, the ſaid John, anno triceſimo Elizabethæ, dyed without Iſſue, the ſaid Elizabeth, being his Niece and Heir, in anno decimo octavo Reginæ Elizabethæ, the Leaſe for three lives expired, the Defendant entred by virtue of a Leaſe from Taylor, and Poynts enters as Heir to Elizabeth and lets to the Plaintiff, and the Defendant *ouſts* him &c. This Caſe was often times argued at the Barr, and afterwards at the Bench, and all the Juſtices were of opinion, That Judgment ſhould be given for the Defendant. The firſt Queſtion was, Whether this Warranty in the Fine (admitting that it was not with any proclamations, and no non-claim) ſhould make a diſcontinuance in Fee, and be a bar to Elizabeth, becauſe it did not deſcend by the death of Alexander without Iſſue upon John, who had right of the Reverſion, but upon Elizabeth his Daughter; And when John afterwards dyed without Iſſue, Elizabeth being his Heir, whether ſhe be barred by this Warranty, or whether the Warranty were determined by the death of Alexander? But all the Juſtices beſides Whitlock (who ſpake not to that point) conceived, That the Warranty continues, and is a Bar unto her; For by the Eſtate for life it was diſcontinued, and Alexander had a new Fee; and then when he by Fine grants that Reverſion with Warranty, the Warranty is annexed to the Fee, and binds him that hath the right. For the Reverſion being diveſted and diſplaced the Fine and Warranty enures thereupon; and by conſequence, although the Warranty did not deſcend upon John, who had the right of Reverſion, but upon Elizabeth, yet when John was dead without Iſſue, the right deſcended to Elizabeth, and ſhe is barred by the Fine; and it is not like to Seymors Caſe, Coke 10. 95. 96. where the Reverſion was not diſplaced, nor a Fee gained, as it is here, Vide viceſimo primo Henrici ſexti, folio quinquageſimo ſecundo; viceſimo ſecundo Edwardi quarti, tit. diſcontinuance. The ſecond point was, Whether this Fine and Non-claim for five years ſhall bar the Daughter? And reſolved, it was a bar. For when John who had right at the time

Ant. 58.

Ant. 58.

2 Rol. 333. 334.

time of the death of Alexander with Iſſue Male, did not proſe- Dier. 3. b.
cute that title, it is a bar, and he ſhall not have the advantage of Poſt. 201.
entry after the death of the Tenant for life, becauſe he hath no other title after his death than he had before, for his title was by the death of Tenant in tail, without Iſſue Male, and then he might have brought his *Formedon*; And when he did not purſue his title after it firſt veſted, he and his Heirs, and all claiming by him, ſhall be barred for ever. And it is not like to the Caſe where Tenant for life makes a Feoffment, and ſo commits a forfeiture, and a Fine with Pl. Com, 378. b.
Proclamations is levied; the Leſſor hath title of Entry in reſpect of 3 Cr. 220.
the forfeiture; as alſo when the Reverſion falls in poſſeſſion by the R. 751.
death of the Tenant for life, and may have election to make his entry within five years after the Reverſion falls in poſſeſſion; but here he hath but one title, viz. after the death of the Tenant without Iſſue Male, when he might have brought his Action of *Formdon*, and not to tarry untill the death of the Tenant for life, whereupon it was adjudged for the Defendant.

Lynner *verſus* Wood.

ACtion of *Trover*, for divers loads of Corn. The Defendant 6.
pleads and entitles himſelf unto them as tythes ſevered, and becauſe the plea amounts but to a Not guilty, the Plaintiff demurred and ſhewed for cauſe, That the plea was not therefore good. Henden, Serjeant, would have maintained this plea, becauſe it concerns matter in the Realty, viz. tythes, and title is pleaded, as it were a confeſſion of the poſſeſſion in the Plaintiff, and as a general bar in action of treſpaſs, and colour given, Sed non allocatur; 3 Cr. 145.
for this action comprehends title in it, and a plea which amounts Co. 10 88. b
but to a general Iſſue is not allowable, it being ſpecially ſhewn for 27 El. c. 5.
cauſe of demurrer; whereupon without argument it was adjudged 2 Cr. 165. 319.
for the Plaintiff.

Anſley *verſus* Chapman, Mich. 3. Car. rot. 842.

EJectione firmæ of Lands in Totenham. Upon a ſpecial ver- 7.
dict the Caſe was, William Loek was ſeiſed in fee of the Tene- Jones 211.
ments in queſtion, and of divers others mentioned in the verdict, and having divers Sons, viz. Thomas, Matthew, John, Henry, and Michael, and being bound in an obligation, That forty pounds, ſhould be paid annually to his wife during her life, made his will, and thereby deviſed all his lands by ſeveral clauſes to ſeveral his Sons; and amongſt others, he deviſed the land in queſtion to Michael and Henry his Sons upon this condition, That if they ſell

ſell it to any but to Mathew Lock his Son, then he to enter, as of his gift; And adds this clauſe; *Item* all the houſes and lands, which I have given between my Sons, is to this purpoſe, That they all ſhall bare part and part like, going out of all my houſes and lands, towards the payment of my Wifes forty pounds *per annum* during her life, which I am bound to pay; and which of my Sons refuſe to bear their part, I will, That he or they enjoy no part of my bequeſt given unto them; but my gift given unto them ſhall go to the reſt of my well-willing Sons: And whether upon all this matter Michael and Henry have an Eſtate in fee by this Will, or for life only, was the ſole queſtion? For if it be an Eſtate for life only, the Plaintiff, who claims under the Heir of Michael Lock, hath no title. And it was argued at the Barr for the Plaintiff, That it was a fee by this deviſe to Michael Lock. Firſt, becauſe the deviſe is to the eldeſt Son, who ſhould have taken a fee by diſcent, if not by the deviſe; and he intended every Son ſhould have a fee as well as his eldeſt. Secondly, by the clauſe, That they ſhall not ſell unleſs to Matthew, is intended, That they had an eſtate of
Co. 9. 128. a. Inheritance, which they might ſell, as ſeptimo Edvardi ſexti, Broke deviſe. Thirdly, becauſe it is deviſed paying ſuch a ſumm, viz. every one his part of the forty pounds per annum, to the Wife, which implies, That the Deviſor intended they ſhould have an Inheritance; And it was ſaid this very Caſe was ſo reſolved in the Court of Wards, by the adviſe of the two chief Juſtices and the chief Baron, that the intention of the Teſtator will make it an Inheritance; whereupon by Noy and Germyn Judgment was prayed for the Plaintiff: And it was argued by Fynch Serjeant, and Whitfield for the Defendant, that for as much as there is not one word in the Will which ſpeaks of any expreſs intent, that he ſhould have fee, the Law will not adjudge it to be ſo, without an intent apparently to be collected out of the words in the Will; and they ſaid, that upon argument in the Exchequer by all the Barons after the ſaid reſolution in the Court of Wards, Tanfield chief Baron (who was one of thoſe that gave the ſaid reſolution in the Court of Wards) was of opinion, that it was not fee, but for life; And ſo all the other Barons agreed with him, and they produced the Record thereof under the Seal of that Court: And afterwards all the Court here reſolved, without open argument, that it was but an Eſtate for life only that paſſed by this deviſe; For as to the firſt reaſon, before alledged on the other ſide, it was anſwered, that the eldeſt Son had not any fee by the deviſe, but by diſcent and
Co. 9. 128. a. operation of Law. To the ſecond, they may be reſtrained from ſelling an Eſtate for life; and it doth not appear thereby he intended to give a fee. And to the third reaſon alledged, It is not deviſed
Co. 3. 21. a. paying ſuch a ſumm, which is a ſumm in groſs, as it is cited in
Co. 6. 16. a. Willock and Hammonds Caſe, But that every one ſhall pay out of
2 Cr. 416. his part, towards the payment of the forty pounds per annum to his
3 Cr. 378. Wife, which is quaſi an annual rent out of the profits of the land,

and

and no ſum in groſs, and therefore no fee given. And as to that objection in the Will, That where he deviſeth lands to his ſeveral Sons, That every one ſhould have fee thereby, as well as in a Chattle, it is no Law, without his expreſs intent may be collected out of the words; otherwiſe the Law will not conſtrue it to be fee in prejudice of the Heir, without the word Heirs, or in perpetuum; or which *tant amount*; whereupon it was adjudged for the Defendant.

Thursby *verſus* Warren, Trin. 4. Car. rot. 217.

8.

ERror of a Judgment in the Common Bench, in an Action upon the Caſe *Sur* Aſſumpſit, by Elizabeth Warren Executrix of William Warren, where the Plaintiff declares; whereas upon the eighteenth day of July anno 1625. the Defendant was indebted to the ſaid William Warren, being an Attorny of the Common-Bench, in divers ſums of money tam pro miſis & cuſtagiis per ipſum Willielmum Warren for the ſaid Thursby, laid out at his requeſt for the proſecuting and defending of divers Suits for the ſaid Defendant, and for his fees in divers Terms, beſides his expences and other ſums of money laid out by the ſaid William Warren, as Servant and Solicitor unto the ſaid Defendant, in divers other Courts in Weſtminſter, at the requeſt of the ſaid Defendant, in proſecution and defence of all his Suits in the ſaid Courts; and in the Court of Lynn Regis, being a Court of Record; as alſo for his Salary, and divers other ſums to him due, and to be paid by the Defendant for his wages, as Steward of divers of his Courts in the County of Norfolk, and yet to him due and unpaid; and alſo in divers other ſums of money expended by him at the requeſt of the Defendant, as well about his other buſineſs, as for his labour for the ſame, to him due and unpaid: And the Defendant being ſo indebted to the ſaid William Warren, he, the ſame day and year at Lynn aforeſaid, delivered unto him a Note in writing, mentioning the ſaid ſums, amounting to thirty nine pounds two ſhillings and nine pence, requiring him to pay it. That the Defendant in conſideration of the premiſes, then and there aſſumed and promiſed, That if James Sedgwick, an Attorney of the Common-Bench there preſent, would peruſe the ſaid Note, and affirm it to be reaſonable, he would pay to the ſaid Warren all the ſums mentioned in the ſaid Note, And alledgedes in facto, That the ſaid James Sedgwick the ſame day, year, and place, upon view of the Note, affirmed it to be reaſonable; and notwithſtanding, That the Defendant had not paid it to the ſaid William in his life, nor to the Plaintiff his Executrix, licet ſæpius requiſitus. The Defendant pleaded Non Aſſumpſit, and found againſt him, and damages aſſeſſed to twenty pounds, and Judgment entred, and Error brought, and aſſigned, becauſe he demanded fees as Solicitor in other Courts, where he was not Attorny, which is *maintenance* and unlawful; and then the Aſſumpſit being void in part, is

Jones 208. 3 Cr. 425. Poſt. 194.

3 Cr. 425.

is void in all, ſo that when intire damages were given, and Judgement for all, it is Error. And all the Court conceived, That an Attorny may very well be a Solicitor for his Client in other Courts, as well as in the Court where he is Attorney, and is allowable; and a promiſe to pay him for it, is lawful: And ſo many a Servant for his Maſter, and it is no *maintenance*, as decimo nono Edvardi quarti, folio tertio: Eſpecially as this Caſe is, having laid out money at his requeſt, and giving a Note thereof to a Stranger, to view whether reaſonable or not; and a promiſe to pay it, if by him thought reaſonable, which of it ſelf is a ſufficient conſideration. And all the Court conceived, That a Solicitor of an inferior rank, which ſolicits Cauſes for his Clients, may take recompence, and take a promiſe to repay what ſums he ſhall lay out; But if a perſon of ſuperior rank ſhould do it, it were *maintenance*, as it is in decimo nono Elizabethæ; whereupon all the Court agreed, That the Aſſumpſit was good, and the Judgment was affirmed, See the Caſe in decimo nono Elizabethæ, Dyer 356. undecimo Henrici ſexti, folio decimo; triceſimo ſecundo Henrici ſexti, folio viceſimo quinto; triceſimo quarto Henrici ſexti, folio viceſimo ſexto. Note alſo that another exception was taken by Banks; For that the promiſe was upon the eighteenth day of July 1621. and the breach aſſigned for not paying upon requeſt, was in September 1621. and the Action was brought in the Common-Bench in Michaelmas Term, anno tertio Caroli Regis, and ſo above ſix years after the promiſe and breach; and then by the Statute of viceſimo primo Jacobi, capite 16. he ought not to maintain that Action: But becauſe it was not pleaded, though the declaration was in Michaelmas, tertio Caroli, the original Writ not being certified, nor appearing when it was ſued out, the Court did not much regard it, and thereupon the Judgement was affirmed.

2 Cr. 520. Ante 107. Moor. 656. Ant. 109.

2 Cr. 520. Ante. 70. 77. 3 Cr. 760. Hob. 68.

Poſt. 163.

Poſt. 294.

This year in Trinity Term there was nothing done remarkable.

Termino

Termino Michaelis, anno quinto *Caroli* Regis, in Banco Regis.

Gilpin *versus*———

ERror of a Judgment in Kingston. The Error assigned, Because in debt upon an obligation made by his Father, he pleaded *Riens per descent* the day of the Writ, and Issue being thereupon, the Jury found, that the Ancestor (whose Heir he is, and for whose Debt he is sued) was seised in fee of such lands, and by his will devised them to the Defendant, being his Son and Heir, and to his Heirs, upon condition, that he should pay his Debts within a year, and if he failed, that his Executors should sell and pay his Debts. They find, that he entred, and did not pay the Debts, and the Executors after entred, and paid the Debts, and sold the lands, and thereupon, &c. The Court there adjudged, that it was *Assets* in the Heirs hands, because he devised it to his Son and Heir in fee; and for that cause the Error was assigned, and it was held, That the Judgment was erroneous: For although the Heir hath a fee, yet he hath it as a Purchasor, being tied with such condition; whereupon rule was given to reverse that Judgment. 1. Pl.Com. 545 b. 3 Cr. 431.

Goodwin *versus* Sir Richard Moore.

THe Plaintiff, by Thomas Goodwin his *prochine Amie*, against Sir Richard Moore, one of the Masters of the Chancery, by Bill in Chancery, in trespass of Battery and false Imprisonment, the Defendant quoad the Battery pleaded Not guilty, quoad the Imprisonment he justified, because his Father held of him such lands by Knights-service, and died seised in his homage, for which he seised the Plaintiff as his Ward, and Issue thereupon; and after Mittimus out of the Chancery, these Issues were delivered here to be tried: And now this Term a Trial was at this Bar, and the second Issue found for the Plaintiff; and it was moved in arrest of Judgment; First, because the Plaintiff sued by *prochine Amie*, where he ought to sue by his Gardian; and for proof thereof, the Case betwixt Jones and Sympson was cited, sed non allocatur, because the Plaintiff may sue by Gardjam or *prochine Amie*, but the Defendant shall sue only by Gardian. Secondly, because there were not pledges found, sed non allocatur, because an Infant shall not find pledges. Thirdly, because the Battery and Imprisonment are alledged to be at one place, and the land holden by Knight- 2. F.N.Br. 27. H Ant. 86. 2 Cr. 641. R. 400. Co. Litt. 127. a.

2 Cr. 631. Ant. 7. 21. Jac. c. 13. Co. 5. 36.

ſervice at another place: and the Venire facias was only from one of the ſaid places, ſed non allocatur; for it is now aided by the Statute; whereupon it was adjudged for the plaintiff.

Kadwalader, and another, *verſus* Bryan.

3. Ante 97. Poſt. 339. 2 Cor. 321.

PRohibition by them two, upon the Statute of viceſimo tertio Henrici octavi capite nono, becauſe they being Inhabitants in ſuch a Town, where ſuch a Prebend and his Predeceſſors, time whereof, &c. had uſed to hold plea of Eccleſiaſtical Cauſes, the Defendant ſued them upon the Statute before the Ordinary in Cauſes Eccleſiaſtical, concerning defamation: The Defendant comes in and pleads, that the Cauſe Eccleſiaſtical being depending in the Prebends Court, the inferior Judge there requeſted the ſuperior Judge to aſſume it, and upon this barr, it was demurred. The firſt reaſon alledged, was, For that it is not ſhewn, that the Cauſe was Eccleſiaſtical, ſo as the Court might judge whether it were fit to be removed. Secondly, For that he did not ſhew, that the requeſt is under ſeal, and if it be not, it is not ſufficient to remove the Cauſe. Thirdly, For that it was in a Peculiar to be removed before the Ordinary, and ſo out of the Statute, and no cauſe of Prohibition; But upon view of the Statute it appears clearly, that it extends as well to Suits out of the peculiar Juriſdiction, as out of the Dioceſs. And for the other Exceptions they were not allowed, becauſe being of a Cauſe Eccleſiaſtical, it needs not to ſhew the particular, as in other pleadings; but as generally pleaded, concurrentibus his quæ in jure requiruntur; and for requeſt it is not requiſite to have it ſhewn under ſeal; and if it ought, it ſhall be well intended by the pleading. In a Feoffment there needs no livery to be alledged; nor in aſſignment of Dower, that it was by metes and bounds needs not to be pleaded; for theſe neceſſary circumſtances ſhall be intended, and therefore the barr was held good; alſo a Prohibition brought by two cannot be good, where the griefs be ſeveral; whereupon conſultation was awarded.

Hob. 16.

Hob. 101. 170. Poſt. 181. 482. Co. L. 303. b. 310 b.

Yelv. 129.

Walker *verſus* Riches,

4. AN Elegit iſſued after Judgment, and the writ recited the Judgment, quod elegit Executionem of the goods and moiety of the land; and the writ was, Ideo tibi præcipimus, quod Bona & Catalla of the Defendants, quæ habuit die judicii prædicti redditi, deliberari facias: Omitting theſe words, Et medietatem terrarum & tenementorum prædictorum, Tenendum the ſaid goods and moiety of the lands, quouſque debitum levetur. By vertue hereof the Sheriff extended the lands and goods, and delivered the moiety of the land, and returned the Enquiſition: And it was now moved by Calthrop, That this writ might be amended (for it is but a miſpriſion of the Clerk) and that the Extent might ſtand: But it was ruled,

ruled, that it ſhall not be amended, and that he ought to have a new Elegit, becauſe the Enquiſition was taken without warrant, the Sheriff having no warrant to extend thoſe lands.

Topſall *verſus* Edwards.

ACtion upon the Caſe for words, for calling him Thief, and for procuring him to be endicted and impriſoned for felony, untill he was acquitted. Upon Not guilty pleaded and found for the Plaintiff, and ten ſhillings damages (ſo under forty ſhillings) it was moved upon the Statute of viceſimo primo Jacobi, capite decimo ſexto (which appoints, That in Action for words, where the damages are aſſeſſed under forty ſhillings, that he ſhall have no more coſts than damages) That he ſhould have but ten ſhillings for coſts; but the Court conceived, foraſmuch as this was not an Action for words only, but alſo an Action upon the Caſe in nature a conſpiracy, and the Defendant is found guilty of both, he ſhall have Judgment for his ordinary coſts; And that it is out of the Statute. 5. Ant. 141. Poſt, 307.

Trankerſley *verſus* Robinſon

ASſumpſit againſt an Adminiſtrator upon promiſe by the Inteſtate, ſuppoſing that the Inteſtate borrowed of the Plaintiff, upon the firſt day of May, anno duodecimo Jacobi Regis, twenty pounds, and in conſideration thereof promiſed to repay it him upon requeſt; And that the Plaintiff, upon the firſt of Auguſt, anno duodecimo Jacobi, requeſted the payment, and he had not paid it; and that the Inteſtate died, and Adminiſtration was committed to the Defendant, who upon requeſt had not paid it, although he had aſſets. Upon Non aſſumpſit pleaded, and verdict for the Plaintiff, Ward Serjeant moved in arreſt of Judgment, That this Aſſumpſit being made in anno duodecimo Jacobi, and the breach in the ſame year, this Action is brought too long after; for by the Statute of viceſimo primo Jacobi, capite decimo ſexto, of limitations, it ſhould be brought within ſix years: Jones and Whitlock conceived the Defendant ought not to have the advantage of this Statute, unleſs he had pleaded it, or had demurred thereupon, becauſe the ſaid Statute hath divers exceptions; ſo that if it be brought after the time, yet if the Plaintiff were an Infant, or *Feme Covert*, &c. it were well enough. But Hide chief Juſtice, and I conceived, for as much as it appeareth by the Plaintiffs own ſhewing in his declaration, That it is out of the limitation of the Statute; and the Statute is in the negative, that it ſhall not be brought at all, unleſs it be brought within the time limited by the Statute; therefore the Defendant ſhall have advantage thereof by exception, without pleading; whereupon the Court would further adviſe. 6. Ants. 160.

Fryer *verſus* Fawkenor.

ERror of a Judgment in *Shrewsbury* in debt, upon an obligation of forty pounds, conditioned to perform an Award, the Defendant demanded *Oyer* of the Bond and Condition, and pleaded, Quod nullum fecerunt arbitrium. The Plaintiff imparles and afterward replies, and ſhews the Award and Breach: The Defendant imparles, and after makes defence, and demands *Oyer* of the Bond and Condition, and pleads the ſame Plea as before: And the Plaintiff imparles: and after replies verbatim as before; the Defendant thereupon demurrs, and ſhews cauſes and reaſons that the Award is ill, and long argument for the Defendant: Then the Plaintiff imparles, and after comes and ſhews divers cauſes and reaſons, and book caſes, That this Arbitriment is good; And all theſe were entred upon the Record; And afterwards Judgment was given for the Plaintiff: And for theſe abſurdities and prolixities in the pleading and defence, it was reſolved, That it was an erroneous and vitious proceeding; whereupon the Judgment was reverſed, and the Clerk fined for making ſuch a Record.

Dunſcomb *verſus* Smith.

8. TRespaſs of Aſſault, Battery, and Wounding. The Defendant pleaded, That the Plaintiff aſſaulted him, and would have beaten and wounded him, and what he did, was in his own defence, The Plaintiff replies, That an Attachment iſſued out of the Chancery to arreſt the Defendant, and that by ſpecial warrant from the Sheriff he arreſted him, and laid hands upon him; and the Defendant reſcued himſelf, and beat the Plaintiff de injuria ſua propria abſque tali cauſa, & hoc paratus eſt verificare, unde, &c. And upon this the Defendant demurred generally, without ſhewing any cauſe: And by all the Court the Replication was held vitious, because he did not conclude his Plea, Et hoc petit quod inquiratur per patriam, but relyed upon his Plea; whereupon it was adjudged for the Defendant.

2 Cr. 589.

Adams *verſus* Hilks.

ERror upon a Judgment, in Briſtow. The Error was aſſigned by Germin, becauſe in an Action of *Trover* of four thouſand Lemmons apud Wardam de *All Saints* in *Briſtow*, and converſion of them in the ſame Pariſh. Upon Not guilty pleaded, the Venire facias was of Briſtow, where it ought to have been of the ward of All Saints in Briſtow; for that is the place of the converſion, which is the moſt certain; and compared it to Arundells Caſe, Coke 6. Rep fol. 14. where a fact was ſuppoſed to be in Parochia Sanctæ Margaretæ in Weſtminſter; and the Venire facias being of Weſtminſter,

3 Cr. 807.

minſter, it was ruled there to be ill, and that it was not aided by the Statute of viceſimo Primo Jacobi: For it is a miſtrial by a wrong Viſne: But all the Court held, that the Tryal was good, and cannot be otherwiſe; for a Ward in a City is but as an Hundred in a County, and thereof there never ſhall be any Viſne; And it is not like to the Caſe that was put where an Act is ſuppoſed to be done, at ſuch a Pariſh, in ſuch a ward in a City; there the Viſne ſhall be of the Pariſh, Vide ſeptimo Henrici ſexti, folio triceſimo octavo, & octavo Henrici quinti, folio decimo; whereupon rule was given, that Judgment ſhould be affirmed, unleſs other matter be ſhewn; And ſo it was done in Adams and Wellings Caſe, upon a Judgment in Briſtow, where the ſame exception was taken, and the Judgment affirmed, unleſs, &c. 2 Cr. 308. 3 Cr. 260. 2 Cr. 222.

——*verſus* Hopkins.

EJectione firmæ. The Plaintiff declares upon a Leaſe made by Sir Archibald Douglas and Dame Elionor his wife, of an houſe and lands in Engleſield. Upon Not guilty pleaded, it appeared upon the evidence, That the Leaſe was ſealed and ſubſcribed by them both, and a Letter of Attorny made by them to deliver it upon the land; and it was thereupon ſtrongly urged by Fynch Serjeant, and Sheldon the Kings Solicitor, that a Letter of Attorny by a *Feme Covert* is meerly void, and the Leaſe is only the Leaſe of the Husband; ſo the Plaintiff hath failed: But all the Court conceived, It was a good Letter of Attorny for both, and the Leaſe well delivered; and it is the Leaſe of them both, during the Husbands life. 10. 2 Cr. 563. Ante 95. 2 Cr. 617. Co. 3. 35. b.

Hill *verſus* Thornton.

PRohibition. The Plaintiff therein ſurmiſing, That his Father died ſeiſed of ſuch Lands, which deſcended to him as Heir, and that the Defendant by Libell in the ſpiritual Court had ſuggeſted, that he made a will and deviſed thoſe Lands to his Executors to ſell, and thereby had bequeathed divers Goods and Portions of mony, &c. and had made the Defendant Executor therein, who therefore ſued in the ſpiritual Court to have probate thereof, ubi re vera he did not make ſuch a will; and a will of Lands ought not to be proved in the ſpiritual Court: And thereupon the Defendant appeared, and ſhewed for cauſe of conſultation; That the ſaid Teſtator made ſuch a will, and made him Executor: and he ſued them to prove the ſaid will; whereupon Iſſue was joyned, whether he made ſuch a will. After evidence the Plaintiff was non-ſuited: And now Godbolt for the Plaintiff moved, That although the Plaintiff be non-ſuited, yet it doth not appear, that the Defendant hath cauſe to have conſultation: For it is not ſhewn that the Teſtator had Goods, &c. and then he hath no cauſe to have probate: 11.

probate; for a Will of Lands needs not be proved: But of Goods there ought to be a probate, otherwise he cannot have any Action. As if a libell were for Tythes to be paid for Trees, which were not Silvæ Ceduæ; Although the Issue be upon a collateral point, and found for the Defendant, yet he shall not have consultation: So if there be a Suit for laying violent hands upon a Clerk, and to have damages, besides correction, in this case no consultation shall be granted, because he hath no such cause of Suit in the Ecclesiastical Court. And all the Court agreed to those Cases: For it appears there, that there was not any cause of Ecclesiastical Suit: But here in this case it appears, That he hath cause of Suit to prove the Will for the Goods; for otherwise he cannot maintain any Action; whereupon consultation was granted, That he might proceed, quoad bona. Observe well this Case, and the cause and reason why a consultation was granted, together with the difference between this and Dens Case, ante pag. 114. & 115.

Ant. 113.

2 Cr. 576.

Hob. 192.

Ante 94. Post. 396. 2 Cr. 346. Hob. 192.

Benson and his Wife *versus* Flower and Blackwells.

12. Jones 215.

ACtion upon the Case for words spoken of the *Feme*. Upon Not guilty pleaded, and verdict for the Plaintiff, and five pounds damages assessed, and seven pounds for costs, they sue execution; And after the money was levied by the Sheriff, and before the return of the writ, the Plaintiff became a Bankrupt; and by the Commissioners of Bankrupts, the said twelve pounds so recovered, was assigned by the name of the money of Benson, to Blackwell and other Creditors. The Sheriff brings the money into Court; the Plaintiff who recovered, prayed to have the money delivered unto him out of Court; And the said Blackwell, and the Creditors pray that the money may be delivered unto them, according to the Sale and Assignment of the Commissioners. And whether it should be delivered unto them was the question? Hide chief-Justice, and Jones, conceived, That the Sale and Assignment were good, And that the money should be delivered unto them: For the damages being recovered, and the costs assessed by the Judgment, it is a Debt; and an Action of Debt well lies upon this Judgment, And the money being levied is properly appertaining unto him; and therefore in the power of the Commissioners to dispose thereof. And as it may be forfeited to the King by outlawry, or assigned unto the King, and he may cause it to be levied; so may the Creditors upon this Commission. But Whitlock and my self were of another opinion, because it being recovered, and execution awarded, and the Sheriff levying the money before he became a Bankrupt, it is as it were in custodia Legis, and the Creditors cannot give a discharge, nor are they parties in Court, who can acknowledge satisfaction; and if the Judgment be reversed, they be not compellable to make restitution; whereupon the Court would further advise. Vide residuum postea, pag. 176.

Jud. Res. 126.

Snape

Snape *versus* Norgate

SCire facias, supposing that he recovered in debt against an Execu- 13.
tor, and had Judgment for forty pound, & seven pounds for costs, Jones 214.
de bonis Testatoris, si tantum, and if not, then de bonis propriis; And 1 Rol. 890.
that before satisfaction he dyed intestate; And administration was committed to the Defendant de bonis primi Testatoris, and also of the Executors; And that the Executor had not satisfied, and therefore he sued this writ, to shew cause wherefore he should not have Execution. The Defendant pleaded Plene administravit of the goods of the first Testator, and Issue thereupon, and found for the Plaintiff, That he had *Assets*: And it was now moved in arrest of Judgment by Reve, that this Scire facias is not well grounded; for the recovery being against an Executor of a debt by the Testator, and he dying intestate, the Suit is determined, and he ought to commence de novo: As if an Executor recover a debt of the Testators, the 2 Cr. 4.
Administrator shall not have a Scire facias upon this Judgment; so è converso, &c. And Hide chief Justice doubted; but Jones, Whitlock, and my self, conceived, that the Scire facias was well awarded. For true it is, that as Administrator, he cannot have a Scire facias upon a Judgment by the Executor, but is put to a Moor. 4.
new Action; for he comes *paramount* the Judgment, and is not Co. 5. 9. b.
party thereto. Yet where a Judgment is against an Executor for Post. 227.
the Testators Debt, although he dyeth intestate, this Judg- 1 Rol. 890.
ment might be executed by a Scire facias against the Administrator of the first Testator, who cometh in place of the Executor, and being for the Debt of the Testator, is lyable thereto, but as Administrator to the Executor, he is not lyable. The second Exception was, because in the first Action of Debt, whereupon the recovery was against the Executor, the Action being for forty pounds upon Bond, he pleaded Plene administravit, and *Assets* found to twenty pounds; and the Judgment is given against him for forty pounds, whereas it ought to have been but for twenty pounds only; and now in the Scire facias upon this Judgment, *Assets* is found to forty pounds; which ought not so to have been, but for the twenty pounds which is found to be *Assets* in his hands; and the Scire facias ought to have been only for that twenty pounds. But the Court conceived, although *Assets* to twenty pounds only be found, yet Judgment for the entire Debt is good: And the Scire facias being to have execution of forty pounds, and being therein found, Post. 373.
he had *Assets* to forty pounds, it may well be conceived, that he Co. 8. 134. a.
had more *Assets* after the first Verdict and Judgment; whereupon the Plaintiff here had Judgment according to that Verdict.

Chambers

Chambers Caſe, cujus principium ante fol. 133.

14. CHambers was brought by an Habeas Corpus out of the Fleet, and returned, That he was committed to the Fleet by virtue of a Decree in the Star-chamber, by reaſon of certain words he uſed at the Councel Table (viz.) That the Merchants of *England* were ſcrued up here in *England* more than in *Turkey*. And for theſe and other words of defamation of the Government, he was cenſured to be committed to the Fleet, and to be there impriſoned untill he made his Submiſſion at the Councel Table, and to pay a fine of two thouſand pounds. And now at the Bar he prayed to be delivered; becauſe this ſentence is not warranted by any Law or Statute: For the Statute of tertio Henrici ſeptimi, which is the foundation of the Court of Star-chamber, doth not give them any authority to puniſh for words only. But all the Court informed him, That the Court of Star-Chamber was not
4 Inſt. 62. erected by the Statute of tertio Henrici ſeptimi, but was a Court many years before; and one of the moſt high and honourable Courts of Juſtice: and to deliver one who was committed by the Decree of one of the Courts of Juſtice, was not the uſage of this Court; and therefore he was remanded, Vide 3. Aſſ. placito 38. 28. Aſſ. placito 34. 21. Hen. 8. cap. 20. 3. H. cap. 1.

Gennings *verſus* Lake, Hillary 3. Car. rot. 612.

15. EJectione firmæ. Upon Not guilty pleaded a ſpecial Verdict was found, that the Prior of Launceſton was ſeiſed in fee of the Tenements within mentioned which then were four Cloſes in North Drocomb in Launceſton; And upon the twenty eighth day of September, anno viceſimo ſeptimo Henrici octavi, demiſed them to John Peres by the name of the four Cloſes in Drocomb, infra Burgum de Launceſton, habendum for ninety and nine years, rendring twelve pounds per annum; And afterwards in the thirtieth year of King Henry the eighth, by Indenture inrolled, the ſaid Prior and Convent ſurrendred all their poſſeſſions to King Henry the eighth, who died ſeiſed, and by mean diſcents it came to Queen Elizabeth, who in the four and twentieth year of her reign, by her letters-patents, granted unto Edward Froſt and John Walker, and their Heirs Totum illud Meſſuagium & Tenementum vocat. Drocombs, alias Drotons, ac omnia Terras, Tenementa, dicto Meſſuagio ſpectant. vel cum eodem dimiſſa, ſituat. jacent. & exiſtent. in Launceſton in Comitat. Cornubiæ, ac nuper Prioratui de Launceſton ſpectantia; And that theſe Lands by mean conveyances were come to the Leſſor of the Plaintiff: And that before the Leaſes aforeſaid, viz. in anno viceſimo primo Elizabethæ, an houſe was erected upon a Rood of land, of the ſaid Cloſes, by the Occupiers thereof, Et quod Tenementum in narratione prædicta mentionatum

natum eodem meſſuagio ſpectabat & pertinebat," and was deviſed and granted with the ſaid Meſſuage, and was always called and known as well by the name of Drocombs, as by the name of North Drocombs, and that the ſaid Tenements at the time of the diſſolution were parcel of the poſſeſſions of the ſaid Priory, and that the ſaid Priory had not other Lands in Launceſton known by the name of Drocombs or North Drocombs there, beſides the Lands in the declaration; and that King James, Anno octavo Regni ſui, demiſed thoſe Lands to John Eldred for threeſcore years, by the name of the four Cloſes, late in the tenure of John Peres in North Drocombs, under whom the Defendant claims; And thereupon theſe Queſtions were moved; Firſt, Whether (the Leaſe being made by the name of the four Cloſes in North Drocombs, there being no other name known when it came to King Henry the eighth) the Patent of the twenty fourth of Elizabeth by another name may be good, for that the Quæn was not well informed? Secondly, the Patent being made of a Meſſuage and Lands thereto appertaining: And this Meſſuage is newly erected after the firſt year of Quæn Elizabeth (for then all the Reverſion of the ſaid four Cloſes is found by the Verdict to come to the Quæn) whether the Lands ſhall paſs? For although Land in caſe of a common perſon may paſs by the name of Lands appertaining to an Houſe, as it is in Hill and Granges Caſe, yet it cannot be ſo in Caſe of the Quæn; and if it might be, yet it ought to be for a longer time than twenty years, to be ſo demiſed and occupied, if you would have it to obtain a reputation of paſſing by the word Pertaining. But all the Court conceived, That the Patent is good for the Meſſuage and all the Land, notwithſtanding theſe exceptions: For although the Land was not built upon, when it was demiſed, and when it came to the King, and that afterwards a Meſſuage was erected thereupon, or it were afterwards converted into another nature before the Patent; yet it ſhall be granted as it is, and by ſuch name as it is known at the time of the Patent; And although it varies from the firſt name in the Leaſe, yet being found to be all one, it paſſeth well by the Patent. Alſo they conceived, That Land may be ſaid to be appertaining to an Houſe, as well in the Kings Caſe, as of a common perſon, where it hath been let and occupied together by a convenient time, Vide Cokes Book of Entries 384. Dyer 362. And afterwards it was adjudged for the Plaintiff.

Pl. Com. 170 b.

Poſt. 308.

Ante 17. 57.

Edgar and Webb *verſus* Sorrell.

16.

THeſpaſs by original for divers loads of Wheat, The Defendant juſtifies, for that the Dean and Chapter *Sanctæ & individuæ Trinitatis* in Norwich ex fundatione Regis *Edwardi* ſexti, were ſeiſed in fee of the Rectory of Henley in the County of Suffolk, wherein the ſaid loads of Corn were growing, & ſevered from their nine parts, which he took by their commands, and ſo juſtifies, and

Co. 10. fol. 90.

give colour to the Plaintiff; They reply, That the said Dean and Chapter were seised in Fee, and that one Thomas——was Dean, and he and the Chapter by Indenture, by the name of Thomas —— Decanus Sanctæ & individuæ Trinitatis, &c. (omitting the words, Co. 3. f. 75. a. Ex fundatione Regis Edvardi sexti) and the Chapter, demised that Rectory to Thomas Gooch Anno nono Elizabethæ Reginæ, for ninety and nine years, And from him conveys it by mean Assignment unto Richard Maplesden, and from him to the Plaintiffs; And that they were possessed, &c. until the Defendant took the said Tythes. The Defendant by rejoynder confesseth the Lease, and all the Assignments, except the Assignment by Richard Maplesden, And that he before the pretended Assignment, viz. in Anno vicesimo secundo Jacobi Regis, by feoffment conveyed the said Rectory unto one William Willton, for which cause the Dean and Chapter entred into the said Rectory as a forfeiture; And the Corn being severed from the nine parts, and set out for Tythes, he took them by the command of the said Dean and Chapter, And traverseth the last grant of the Term by Richard Maplesden; And thereupon the Plaintiffs demurred: And now Germin for the Plaintiffs shewed his reasons: First, Because the Defendant in the Rejoinder pleaded a Feoffment of the Rectory, and doth not shew that any Gleab Ant. 101. was appertaining thereto, whereof he might make a Feoffment, sed Co. Lit. 303. b. non allocatur; For it shall be intended a good Feoffment, and that Ant. fol. 162. there was Gleab-land thereto appertaining, Vide decimo quinto 2 Cr. 411. Henrici septimi, & decimo sexto Henrici septimi, folio primo. The second Exception was, Because he pleaded an Entry after the forfeiture, and shews not a Deed of Command to enter, sed non allo- R. 540. catur; For it is not pleaded, That any entred by their command after the forfeiture, but that the Dean and Chapter themselves entred, which shall be entended a sufficient Entry; and all necessary 2 Cr. 411. circumstances shall be implyed. Also the Feoffment is not only a forfeiture, but a disseisin, being by Tenant for years, and then every one may enter on their behalf, where they have right of Entry, Vid. 11 Assis. plac. 2. The third Exception was taken to the Replication; for this Lease is pleaded to be made by the Dean and Chapter, omitting part of their name; and for this cause was meerly void, and so the Plaintiffs had not any title; Wherefore it was adjudged for the Defendant.

Sir John Bodvell *versus* John Bodvell, Mich. 2 Car. rot. 457.

17. Jones 214. ERror of a Judgment at the grand Sessions at Carnarvan, in an Annuity by bill for two hundred and twenty pounds, arrearages of an Annuity granted of twenty pounds, quas ei debet, And counts, That the Defendant Sir John Bodvell upon the fourth day of November Anno quarto Jacobi Regis, by a Deed shewn, had granted to the Plaintiff John Bodvell the said Annual Rent, by the name of an Annuity or annual Rent of twenty pounds habendum to him for his life,

life, by virtue whereof he was ſeiſed in dominico ſuo ut de libero tenemento, and for eleven years behind at ſuch a Feaſt, he brings the Action: The Defendant, Sir John Bodvell, demands *Oyer* of the Deed, which being entred and read, it thereby appeared, That it was a Rent iſſuing out of a certain Parſonage in the ſaid County, with a clauſe of diſtreſs upon the Rectory or Church of Kenthkelley, and divers other the Rectories in the ſaid County there mentioned; and pleaded, That the ſaid John Bodvell granted the ſaid Rectory with the Church of Kenthkelley to him and his Heirs; whereupon he entred therein, and ſo pleaded it as an Extinguiſhment, &c. The Plaintiff John Bodvell ſaith, That there was nothing granted thereby which was pertaining to the ſaid Church. The Defendant Sir John Bodvell pleaded, That ſuch a piece of Land was parcel of the ſaid Rectory and Church: And thereupon they were at Iſſue, and found for the Plaintiff John Bodvell, and Judgment given for him. And now Error was brought by Sir John Bodvell, and ſeveral Errors aſſigned upon the Record, to which John Bodvell pleaded In nullo eſt Erratum, and all were over-ruled; And now ore tenus he inſiſted upon other Errors: Firſt, That he declaring upon an Annuity, or annual Rent granted for life virtute cujus fuit ſeiſitus in Dominico ſuo ut de libero tenemento, proves, that it is no Annuity, but a Rent-charge, and that he made it his election to have it as a Rent-charge: and in proof thereof was cited tertio Edvardi ſexti, Dyer 61, & quinto Elizabethæ, Dyer 220. ſed non allocatur; For being an Annuity granted for life, although it is no Rent-charge, yet he may plead ſeiſitus in Dominico ſuo ut de libero tenemento; And although ſuch exception were taken by Bendloſſe, in tertio Edvardi ſexti, who cited that Caſe, yet the Court notwithſtanding reſolved for the Plaintiff: And the Lord Coke, in his Book of Entries, fol. 49. & 50. hath two ſeveral declarations in this manner, and yet the Plaintiff had Judgment. The ſecond Error aſſigned ore tenus was, That this Bill of Annuity is not maintainable, but he ought to have brought an original Writ; For the Statute of triceſimo quarto et quinto Henrici octavi, capite viceſimo ſexto, doth appoint, that in Wales Actions real and mixt ſhall be ſued by original Writ, and not by Bill, but Actions perſonal may be there ſued by Bill; And that this is an Action mixt, he relyed upon 2 Hen. 4. fol. 13. Fitzherb. Rent. 48. Releaſe of Actions real is a good barr in this, ſo Releaſe of Actions perſonal; and this being a Frank-tenement is rather real than perſonal: And Coke in his Commentary upon Littleton 285. affirms, That it is a mixt Action. But all the Court conceived, an Annuity brought by Bill there, is well brought; For being an Annuity which charges the perſon who grants it, though with a clauſe of diſtreſs, not being granted by him for himſelf and his Heirs, until Election made, and a diſtreſs taken is meerly perſonal: Vide ſecundo Edvardi quarti, folio octogeſimo quarto, long. quinto Edvardi tertij, folio quadrageſimo: and therefore a Releaſe of Actions perſonal is clearly a barr; alſo Noy R. 29.

for the Defendant in the Writ of Error moved, that this being not assigned for Error, the Plaintiff should not have advantage thereof; for the Statute refers, That Suits shall be as in North-wales, and
R. 259. clearly in North-wales the custom was to sue by Bill or Plaint: And if he had assigned, that for Error the Defendant here might have maintained it by custom of North-wales, as in tricesimo sexto Edvardi primi. Error assigned of a Judgment in Wales in a Quod ei deforceat, in nature of a Disseisin, and in Wales the Seisin is alledged post ultimam pacem proclamatam, whereas in England it is post primam transfretationem. And it was maintained by custom of North-wales, vide decimo octavo Edvardi secundi, Assise 354. tertio Edvardi tertij, folio decimo nono; Hillarij sexto Edvardi tertij, rotulo vicesimo octavo in this Court. Error assigned because they held plea of Lands in North-wales, where the Land was held of the King in Capite; and for that cause it was reversed, and the reason entred upon the Roll: So it appeareth they have Jurisdiction to hold plea of Lands not held of the King, and that Jurisdiction by the Statute is in the Affirmative, as it is held, Co. 11 Rep. fol. 64. Doctor Fosters Case, and tricesimo tertio Henrici octavi, Dyer 50.
2 Cr. 481. A Statute in the Affirmative doth not take away a former Statute, but they stand together. But the Court did not rely on this point, because for the former reasons they all held, that this Judgment was good enough; And the Judgment was affirmed,

Grosse *versus* Gayer, Hill. primo Car rot. 828.

18. IN Ejectione firmæ. Upon a special Verdict the Case was;
Jones 217. Tregose was Endicted of a Præmunire, upon a Statute of decimo tertio Elizabethæ Reginæ, and afterwards made a gift in tail of that Land, and was after attained by Verdict, and had Judgment for the said Offence; And it was afterwards found by Enquisition, upon a Commission out of the Exchequer, That Tregose was seised in fee of those Lands at the time of the Offence committed, and that the Queen by Patent granted those Lands to Sir George Carie, under whom the Plaintiff claims, and the Defendant under the title of the Tenant in tail, And if, &c. The principal point argued was, Whether an Attainder in a Præmunire shall have relation to the Offence for the forfeiture of his Lands, or only to the time of the Judgment? Secondly, admitting that this forfeiture shall relate to the Offence, whether this Patent after the Enquisition, by Commission under the Exchequer Seal (no Office being found by Commission under the great Seal) be good by the Statute of decimo octavo Elizabethæ capite secundo, which makes Patents upon valuable consideration good, notwithstanding there be not any Enquisition found by the Commission under the great Seal? And quoad the first point,

point, the Juſtices did not reſolve, being a Caſe of difficulty; But for the ſecond they all reſolved, That by this Judgment, He ſhould forfeit &c. That in that Caſe nothing veſted in the King until Office found; and it ought to be an Office by Commiſſion under the great Seal; for the Franktenement being in the party offending (and as this caſe is, in a ſtranger by the gift in tail) at the time of the Attainder, it ſhall not be diveſted from him, and in the King without Office by Commiſſion under the great Seal, which is only an Office to intitle the King, and not by Enquiſition by virtue of a Commiſſion under the Exchequer Seal, which is but for inſtruction or information to the King, and for his Officers to put the Lands holden of the King in charge. But here the Lands are not come unto the King until the office found; Therefore for this point only, it was adjudged for the Defendant: And this is out of the Statute of decimo octavo Elizabethæ, Vide Coke 1. Rep. fol. 42. & 3. Rep. fol. 10. & 5. Rep. fol. 52. Plowd. 486. Dyer 325. 29 Hen. 8. *Charter de pardon* 52. 27 Hen. 8. *Office devant Eſcheator* 17.

Co. Litt. 13. a. b. & 130. a. 390 b.

Ante 100.

Co. 5. 56 b.

Co. 5. 42. a. b.

The Earl of Pembroke *verſus* Boſtock and Green.

QUare Impedit for the Church of Mottesſent, wherein he counts, That Queen Elizabeth was ſeiſed in fee of the Advowſon of the ſaid Church, as in groſs, and preſented Mr. Pinder, who was admitted, inſtituted, and inducted, and that afterwards ſhe granted the Advowſon in fee to Sir Chriſtopher Hatton, who by his Deed granted to Sir Walter Sands Knight, who died ſeiſed, which deſcended to Sir William Sands his Son and Heir, who, in Anno duodecimo Jacobi, granted the next avoidance to Henry Earl of Danby, who granted it to the Plaintiff, and he, for the diſturbance, brings this Action. The Defendant Green pleaded, Quod prædictus Willielmus Sands non conceſſit, and Iſſue thereupon. And Boſtock pleaded and confeſſed Queen Elizabeths Title, and that, before ſhe had preſented Mr. Pinder, ſhe preſented Richard Donnel, who was admitted, inſtituted, and inducted: And that afterwards the Queen preſented Mr. Pinder (the Church being full of the ſaid Richard Donnel) who was admitted, inſtituted, and inducted; And that afterwards, the ſaid Queen Elizabeth granted unto Sir Chriſtopher Hatton, &c. as in the declaration, and that he conveyed it to Sir Walter Sands, who, in Anno octavo Jacobi, let the ſaid Advowſon to John Moore Serjeant at Law, for One and twenty years, who granted it to Green the Defendant, and that the Church became void by the death of Richard Donnel; whereupon he preſented the Defendant, Mr. Boſtock, unto it, and traverſeth, That the Church was void at the time of the Inſtitution of the ſaid Pinder, and Iſſue thereupon, and found for the Plaintiff for that ſecond Iſſue: And upon the firſt Iſſue a ſpecial Verdict was found, That at the time of the Grant, by William Sands, he was

19. Godb. 439. Jones 215.

was Eſquire only, and not Knighted: And upon that alſo, Judgment was given for the Plaintiff: And upon this Judgment, Error was brought. The firſt Error aſſigned was, Becauſe he counts of a Grant by William Sands Knight, and it was found he was not Knight; and ſo it being a void Grant by that name, and the declaration untrue, Judgment therefore ought to have bin for the Defendant. But all the Court conceived, although it is found, That he was not Knight at the time of the Grant, yet it is not material: For the Iſſue being, Whether William Sands granted, &c. that finding is idle and ſuperfluous, and is not material; But peradventure if the Iſſue had bin upon that Grant to Walter Sands Knight, and the matter had bin found, it had bin material, as it is in Anno decimo tertio Elizabethæ Reginæ, Dyer 300. where the Iſſue was, whether Sir *Thomas de la Warr* Miles, Lord *de la Warr* conceſſit? And it was found, That he made that Grant in the life of his Father, ſo as he was not then Lord *de la Warr*, nor Knight, which was againſt him that pleaded it. But here the Iſſue is upon the Grant by William Sands, and whether it appears that he was a Knight at the time of the Grant or not, is not conſiderable; For the Grant is good enough, and he had good title to grant, Vide quarto Henrici ſexti, folio primo by Rolſe; viceſimo primo Edvardi quarti, folio ſeptuageſimo primo et ſeptuageſimo ſecundo; triceſimo octavo Henrici ſexti, folio triceſimo octavo; ſeptimo Henrici quarti, folio ſeptimo; viceſimo ſexto Henrici ſexti, Bro. 100. where it ſhall be by an Innuendo, and the Grant ſhall not be hurt thereby; and when it is admitted in pleading, the finding of the Jury ſhall not prejudice. The ſecond Error aſſigned was, That the Defendant Boſtock in his pleading, pleaded a precedent Leaſe for years to John More, before the Grant by him, under whom the Plaintiff claims, which is good title for the Defendant, and deſtroys the Plaintiffs title, if it be true, which the Plaintiff doth not expreſſly deny, but by his proteſtation; ſo it is not denied by the Plaintiff; And therefore for this cauſe the Plaintiff ought not to recover. And Judgment ought not to be given for him, but for the Defendant; And in proof hereof were cited ſeptimo Edvardi quarti, folio viceſimo, Dyer 119. duodecimo Edvardi quarti, folio ſeptimo; nono Henrici ſexti, folio viceſimo ſexto; decimo Edvardi quarti, folio nono, ſed non allocatur; For although it had bin a good plea, and would have deſtroyed the Plaintiffs title, if the Defendant had relyed thereupon, and the Plaintiff ought to have anſwered it: Yet when it is pleaded by way of inducement only to the Travers, and he traverſeth other matter in the Count; The not anſwering or making proteſtation thereto by the Plaintiff, is not material; And the Iſſue being joyned upon the Avoidance, and that being found, and not denied by the Plaintiff, is not material; For the Travers waits upon the matter precedent, Vide Coke 6. Rep. fol. 24. Reads Caſe; long. quinto Edvardi tertij, folio nono; tertio Edvardi tertij, folio decimo ſeptimo;

where-

1 Cr. 240.

Co. Lit. 227. a. Ante 131. Hob. 54.

Ante 105. Poſt. 586.

whereupon the Judgment was affirmed; And the Court assessed the damages to fourscore pounds, although the value was found in the Verdict to be an hundred pounds per Annum: Yet because the Defendant in the Writ of Error had obtained a Writ to the Bishop; and his Clerk was admitted, instituted, and had gotten the possession, until he was removed by a Writ of Restitution, which was half a year and more, the Court would give but sixty pounds for damages, and twenty pounds for costs. Ante 145. p. 401. 2 Cr. 636.

——— *versus* Heylers.

TRespass by *Baron & Feme* for Battery done to them both ad damnum ipsorum; The Defendant pleaded Not guilty, and it was found for him and certified, That he did it as Constable in execution of his Office: And double costs were prayed, according to the Statute of Septimo Jacobi, capite quinto. But Henden Serjeant moved, That the declaration was ill, because *Baron & Feme* cannot join in Battery done to them both, as it is nono Edvardi quarti: And therefore Judgment ought to have been given against the Plaintiff upon the Declaration, and not upon the Verdict: And so no costs ought to have been given. But all the Court conceived, because the Defendant is found Not guilty, and what he did was as Officer, and the Statute gives him double costs for his veration, which veration appears, the Plaintiffs shall not take advantage of the insufficiency of the Declaration and Writ, to excuse themselves of costs. 20. 2 Inst. 236. Ante 90. Post. 553. Post. 545. Hob. 284. Post. 545. 2 Cr. 159. Post. 286. 2 Cr. 251. Hob. 219. Dyer 32. b.

Jeffes Case.

JEffes was endicted, For that he exhibited an infamous Libel directed to the King, against Sir Edward Coke, late chief Justice of the Kings Bench, and against the said Court, for a Judgment given in the said Court in the Case of Magdalen Colledge, affirming the said Judgment to be Treason, and calling him therein Traitor, perjured Judge, and scandalizing all the Professors of the Law, and containing much other scandalous matter: And fired this Libel upon the great Gate at the entrance of Westminster-Hall, and in divers other publick places. And being hereupon Arraigned, prayed, That Counsel might be assigned him, which was granted, and he had them, but would not be ruled to plead as they advised; But put in a scandalous Plea, and insisting upon it, affirmed he would not plead otherwise; whereupon it was adjudged, he should be committed to the Marshal, and that he should stand upon the Pillory at Westminster and Cheapside with a Paper mentioning the Offence, and with such a Paper be brought to all the Courts at Westminster, and be continued in Prison, until he made his Submission in every Court, and that he should be bound with Sureties to be of good behaviour during his life, And 21. Post. 504. Ante 147.

And should pay a thousand pound Fine for that offence to the King.

R. C's Case.

22. THe same day R. C. was brought to the Barr (being removed from St. Albans by Habeas Corpus and Certiorari, where he was a Prisoner, and attainted for Felony (viz. for Horse stealing) And it was now demanded of him what he could say, why Execution should not be done upon the Endictment; and because he could not shew good cause to stay the Execution, he was committed to the Marshal, who was commanded to do Execution; And the next day he was hanged.

Symms *versus* Smith.

23. Jones 218. Post. 299. COvenant. Whereas the Defendant (reciting that she had an Estate for life in such customary Lands) covenanted, That she would surrender the Estate upon Request, and permit the Plaintiff to enjoy the said Lands, and take the Rents, Issues, and Profits of them; And in facto assigns for breach, That she did not suffer him to enjoy the said Lands, but had received the Rents, Issues, and Profits of them from the time of the making of the Indenture until the day of the Writ, &c. The Defendant demurrs upon this Declaration: And it was now argued at the Barr by Ball for the Plaintiff and by Rolls for the Defendant. And the Defendant shewed for cause; First, That there was not any request alledged for the Permission, Sed non allocatur; Post. 299. For the Request extends only to the Surrender, and not to the Permission. Secondly, That he doth not alledge a special disturbance by entry or otherwise. Thirdly, The breach is too general in assigning, That she received the Rents, Issues, and Profits of the Lands, without shewing what; so as it might be issuable, and thereby recover in damages as much as the Defendant received, according as it shall be proved to the Jury; Co. 4. 80. b. 2 Cr. 171. But the Court conceived that in Covenant he may assign as many breaches as he will, though not in debt upon an Obligation for performance of Covenants: For in that Case there ought to be a certainty, Post. 299. and certainly assigned: but in a Covenant it may be assigned as general as the Covenant is; and therefore it was adjudged for the Plaintiff, Vide Cok. Rep. fol. 47 Ed. 3. 3. 46 Ed. 3. 4.

Benson *versus* Flower, cujus principium ante folio 166.

24 IT was moved again the last day of this Term, And the Assignment before the Commissioners was read in Court; And for R. 729. as much as the becoming Bankrupt, and the Assignment of the Commissioners were after the Writ of Execution served; Although they were before the return of the Writ, Jones, Whitlock, and my self

ſelf conceived, That the money in the Sheriffs hand was not aſſignable, although by the Judgment the damages and coſts were certained, and turned into rem Judicatam, for it cannot be ſaid to be the Bankrupts money, untill it be paid unto him, and in the mean time it is in the hands of the Sheriff, Quaſi in cuſtodia Legis. And the Caſe is ſo much the ſtronger, becauſe it was upon a Capias ad ſatisfaciendum, and the money paid to the Sheriff to ſatisfie the Execution, ſo as it is not due to the Plaintiff, until it be paid unto him. And none may give a diſcharge thereof; but the Plaintiff, who is Party to the Record: And being levied by Record, it ought to be delivered unto him, who may acknowledge ſatisfaction upon the Record. And the aſſignées are Strangers to the Record, and cannot have the benefit thereof; therefore it was reſolved by the aſſent of Hyde the chief Juſtice, who firſt doubted thereof, that this money ſhould be delivered to the party who recovered, he acknowledging ſatisfaction. Jud. Reſ. 126, 7. Ante 149. Poſt. 540.

Shalmer *verſus* Foſter and his Wife. Trin. 5. Car. rot.

ACtion upon the Caſe for words: For That the Wife of the Defendant ſpake of the foreſaid Plaintiff, to Anne Rocheſter the Plaintiffs Mother, theſe words, Where is that lying Thief thy Son? (innuendo the Plaintiff) He hath murthered my Aunt (quandam *Dorotheam Stoke*, amitam Defendentis innuendo) and I will prove it: The Defendant pleaded Not guilty, and found for the Plaintiff; and moved in arreſt of Judgment, That theſe words are incertain of whom they were ſpoken, no precedent Communication being alledged to be of the Plaintiff, nor that he was the only Son of the ſaid Anne Rocheſter, to whom the words were ſpoken; and it may be that ſhe had divers Sons, and every of them might have an Action as well as the Plaintiff: And therefore without ſuch averment or precedent Communication of him, that the ſtanders by might know without ambiguity who is meant by the words, the Action is not maintainable, And Witlock, and my ſelf were of that opinion; For non conſtat de perſona; and in proof of that point I cited a preſident, Paſch. viceſimo Jacobi, betwixt Harvey and Chamberlain, and another Caſe, Trin. decimo quinto Jacobi, betwixt Benner and Codnam, where for ſuch words it was adjudged for the Defendant: But Hyde chief Juſtice and Juſtice Jones doubted thereof, becauſe it was alledged, That ſhe ſpake of the Plaintiff, and is found guilty: But it was thereto anſwered, That ſo are the words in every declaration, and ſo it was in the preſidents cited: But becauſe the words be not put in certain nor aided by averment, the declaration is not good, and cannot be aided by the Verdict; Whereupon the Court would adviſe, Et adjurnatur. 25. R. 51. 2 Cr. 635. Poſt. 37. 2 Cr. 108. Poſt. 443.

Termino

Termino Hillarii, anno quinto *Caroli Regis*, in Banco Regis.

Deckrow, & alii, *verſus* Jenkins

1. EJectione firmæ, againſt four, of an Houſe and twenty Acres of Land, Three of the Defendants were found guilty of the Houſe, and ten Acres of Land, and Not guilty for the reſidue. The fourth Defendant is found Not guilty generally, and
2 Cr. 134. Judgment was entred, That he ſhould recover his term in the Houſe and ten Acres of Land, and coſts againſt the three Defendants; And that the ſaid three Defendanes capiantur, And that they be acquitted quoad reſiduum, whereof they be acquitted, And
Poſt. 453. that the Plaintiff quoad the three Defendants, pro falſo clamore, for ſo much as they were acquitted; and pro falſo clamore againſt the fourth Defendant, ſit in miſericordia. And becauſe they were not two ſeveral Miſericordia's, ſcilicet, quoad the three Defendants, pro falſo clamore, pro tanto, &c. whereof they were acquitted, quod ſit in miſericordia. And pro falſo clamore, quoad the fourth Defendant, quod ſit in miſericordia: But joynt quoad all the Defendants, quod ſit in miſericordia. It was aſſigned for Error, and much inſiſted by Germin, that it was Error, Becauſe there ought to have been ſeveral Amercements; And the joyning of both Amercements in one is error, And in proof thereof he relyed upon Cok. Rep. 8. fol. 62. Beechers Caſe. But Broome Secundary
Ant. 54, 55. affirmed it to be the uſual courſe of that Court, if the one Defendant is found guilty for part, and not found guilty for the reſidue, and the other Defendant is found not guilty for all, then the Entry is, That the Plaintiff be in miſericordia but once, which is ſpecially entred; whereupon the Court would further adviſe. And being moved again afterwards, Judgment was affirmed, Vide quadrageſimo ſeptimo Edvardi tertii, folio decimo; nono Henrici ſexti, folio ſecundo; Coke 5 Rep. folio quinquageſimo nono. Note the Prenotaries ſaid, that it is the uſual courſe to make Entries in this manner, Yet that ſometimes they find Entries have been made thus; That quoad the three for ſo much whereof they were acquitted, that he be in miſericordia, And for the fourth, that he be in miſericordia.

Gryffyth *verſus* Jenkins.

Poſt. 444. ERror upon a Judgment in Wales, in a Quod ei deforciat in nature of a Writ of Right. The firſt Error aſſigned was, Be-

cauſe

cauſe the Writ being general, the Count is, That he deforced him of a Meſſuage, and of nine and twenty Acres of Land, thirty Acres of Meadow, fourty Acres of Paſture, and of twenty Acres *de Jampna & Brueria*, which ought to be ſhewn in certainty; as in a Præcipe of twenty Acres of Meadow and Paſture, if he ſhews not in particular the quantity of every of them and their nature, it is ill. But here in this Quod ei deforciat it is well enough; for *Jampna* and *Brueria* are not intended Lands and ſeveral ſorts, but of one and the ſame Land, which is Heath ground, whereupon Goſſe and Furrs are growing. And in proof thereof was cited the Caſe of the Lady Howard againſt Candiſh in dower. The ſecond Error aſſigned was, That the Iſſue is not well joyned, Becauſe he pleaded he hath majus jus tenendi tenementa prædicta; then the Plaintiff, and he doth not ſay ſibi et Heredibus ſuis, according to the uſual courſe: For it may be, that he was tenant for life, or Tenant en tail; and therefore becauſe he did not ſhew in certainty *que eſtate*, it was ill, ſed non allocatur; For the Court would not intend he had a leſſer Eſtate that in fee; and if he were but Tenant for life, it was at his own peril, to plead in that manner; for it is a forfeiture of his Eſtate: And it was held to be no Error. The third Error aſſigned was, Becauſe the Venire facias had not fifteen days betwixt the Teſte and the return thereof, but was the next day after the Teſte. Sed non allocatur; For in Wales they have their Proceſs from day to day in one and the ſame Seſſion: wherefore the Judgment was affirmed. Poſt. fol. 573. Co. Litt. 251. b.

Gylbert *verſus* Fletcher, Trin. 4. Car. rot. 1359.

COvenant againſt an Apprentice for departing from his Service without licence, within the time of his Apprentiſhip. The Defendant pleaded, That at the time of the making the Indenture, he was within age; And thereupon it was demurred: And it was argued at the Barr, that this Indenture ſhould bind the Infant, Becauſe it was for his advantage to be bound Apprentice, to be inſtructed in a Trade; he is alſo compellable by the Statute of quinto Elizabethæ Reginæ, to be bound out an Apprentice: But all the Court reſolved, that although an Infant may voluntarily bind himſelf Apprentice; And if he continue Apprentice for ſeven years, he may have the benefit to uſe his Trade: Yet neither at the Common Law, nor by any words of the Statute of quinto Elizabethæ, a Covenant or Obligation of an Infant for his Apprentiſhip ſhall bind him. But if he miſ-behave himſelf, the Maſter may correct him in his Service, or complain to a Juſtice of Peace, to have him puniſhed, according to the Statute; But no remedy lyeth againſt an Infant upon ſuch Covenant; And therefore it was adjudged for the Defendant. Vide viceſimo primo Henrici ſexti, folio triceſimo primo; viceſimo primo Edvardi quarti, folio ſexto; nono Henrici ſexti, folio octavo. 3. B. 513. Moor. 135. 2 Cr. 494.

Babington *verſus* Wood.

4. Hut. 111. Jones 220. DEbt. Upon an Obligation conditioned, whereas the Plaintiff intended to preſent the Defendant to ſuch a Benefice, That if the Defendant at any time after his admiſſion, inſtitution, and induction, at the Plaintiffs requeſt, reſigned the ſaid Benefice into the hands of the Biſhop of London, that then, &c. The Defendant upon *Oyer* of the Condition demurred generally: And this was argued by Grimſton for the Plaintiff, and by Calthrop for the Defendant, who ſhewed, that the cauſe of demurrer was, For that the condition of the Bond, being to reſign upon requeſt of the Patron, it is Symonie and againſt Law, ſo the Bond void. But all the Court conceived, That if the Plaintiff had averred, That the Obligation was made to bind him to pay ſuch a ſum or to make a Leaſe, or other Act, which appears in it ſelf to be Symony; then upon ſuch a Plea, peradventure it might have appeared to the Court to be Symonie, and might have been a queſtion, whether ſuch a Bond for Symony ſhould be void? But as it is pleaded by the Condition, it doth not appear that there is any Symonie: For ſuch a Bond, to cauſe him to reſign, may be good, and upon good reaſon and diſcretion required by the Patron (viz.) if he be non reſident, or takes a ſecond Benefice by a Qualification, or the like. And a preſident was ſhewn in octavo Jacobi betwixt Jones and Lawrance, where ſuch a Bond was made to reſign a Benefice upon requeſt, when the Son of Jones came to twenty four years of age, to the intent, that he then might be preſented unto it; And it was adjudged good in the Kings Bench, and affirmed in a Writ of Error in the Exchequer Chamber. And of this opinion was all the Court; whereupon Judgment was given for the Plaintiff.

21 Rol. 417.

2 Cr. 274. 248, 9.

Keyley *verſus* Manning, Trin. Car. rot. 971.

5. COvenant for not building of an Houſe; where the Defendant covenanted, That he would erect three Houſes upon ſuch Land demiſed unto him, unleſs he were reſtrained by the Kings Proclamation, &c. The Defendant pleaded, that ſuch a day and year the King made a Proclamation to reſtrain building; and thereupon the Plaintiff demurred: And the cauſe ſhewn, was, Becauſe a Proclamation was pleaded, and no place expreſſed where the Proclamation was made, and ſo no *Viſne*, if Iſſue ſhould have been joyned thereupon, Alſo becauſe it is not pleaded to have been made ſub magno Sigillo Angliæ, otherwiſe it is not good. And of this opinion were all the Court, upon the firſt motion, Becauſe a Proclamation binds not unleſs it be under the great Seal; and if it be denyed, there can be no Iſſue thereupon (but only *Null tiel record*) which cannot be, unleſs he pleads it to be ſub magno Sigillo. But afterwards

Poſt. 461.

afterwards, being again moved, Jones and Whitlock seemed to doubt thereof, Because when it is pleaded, that such a Proclamation was made, it shall be intended duly made: As in *resceus* it is returned, quod fecit Warrantum, although it be not pleaded to be in writing, yet it shall be intended. But it was thereto answered, True it is, when it is but by way of inducement, But otherwise, when it is the substance of the Plea: Whereupon it was adjourned. Post. 461. Ant. 162. 482.

The King *versus* Sir John Eliot, Denzell Hollis, and Benjamen Valentine

AN Information was exhibited against them by the Attorny-General, reciting, That a Parliament was summoned to be held at Westminster decimo septimo Martii, tertio Caroli Regis ibid. inchoat. And that Sir John Eliot was duly elected, and returned Knight for the County of Cornwall, And the other two, Burgesses of Parliament for other places, and Sir John Finch chosen Speaker. That Sir John Eliot machinans & intendens, omnibus viis & modis, seminare & excitare discord, evil will, murmurings, and seditions, as well versus Regem, Magnates, Prælatos, Proceres, & Justiciarios suos, quam inter Magnates, Proceres, & Justiciarios, & reliquos Subditos Regis, & totaliter deprivare & avertere regimen & gubernationem Regni *Angliæ*, tam in Domino Rege quam in Conciliariis & Ministris suis cujuscunque generis; & introducere tumultum & confusionem in all estates and parts, & ad intentionem, That all the Kings Subjects should withdraw their affections from the King. The twenty third of Febuary anno quarto Caroli in the Parliament, and hearing of the Commons, falso, malicioso, & seditioso, used these words, The Kings privy Council, his Judges, and his Counsel learned, have conspired together to trample under their feet the liberties of the Subjects of this Realm and the Liberties of this House. And afterwards, upon the second of March anno quarto aforesaid, the King appointed the Parliament to be adjourned untill the tenth of March next following, and so signified his pleasure to the house of Commons: And that the three Defendants, the said second day of March quarto Caroli, malicioso agreed, and amongst themselves conspired to disturb and distract the Commons, that they should not adjourn themselves, according to the Kings pleasure before signified; And that the said Sir John Eliot, according to the agreement and conspiracy aforesaid, had maliciously in propositum & intentionem prædict. in the House of Commons aforesaid, spoken these false, malitious, pernitious, and seditious words precedent, &c. And that the said Denzell Hollis according to the agreement and conspiracy aforesaid between him and the other Defendants, then and there falso, malicioso & seditioso, uttered hæc falsa, malicioso, et scandalosa verba precedentia, &c. And that the said Denzell Hollis and Benjamen Valentine, 6. Post. 604.

tine, ſecundum Agreamentum et conſpirationem prædict. et ad intentionem et propoſitum prædict. uttered the ſaid words upon the ſaid ſecond day of March, after the ſignifying the Kings pleaſure to adjourn: And the ſaid Sir John Fynch the Speaker endeavouring to get out of the Chair according to the Kings command, they vi et armis, manu forti et illicito aſſaulted, evill intreated, and forceably detained him in the Chair; and afterwards, he being out of the Chair, they aſſaulted him in the Houſe, and evill intreated him. Et violenter manu forti et illicitò drew him to the Chair, and thruſt him into it; whereupon there was great tumult and commotion in the Houſe, to the great terror of the Commons there aſſembled, againſt their allegiance in maximum contemptum, and to the diſheriſon of the King his Crown and dignity; for which, &c. To this Information, the Defendants appearing, pleaded to the Juriſdiction of the Court, that the Court ought not to have conuſance thereof, becauſe it is for offences done in Parliament, and ought to be there examined and puniſhed, and not elſewhere: It was thereupon demurred, and after argument adjudged, That they ought to anſwer: For the charge is for conſpiracy, ſeditious acts, and practices, to ſtop the adjournment of the Parliament, which may be examined out of Parliament, being ſeditious and unlawful Acts; And this Court may take conuſance and puniſh them. Afterwards divers Rules being given them to plead, and they refuſing, Judgment was given againſt them, viz. againſt Sir John Eliot, That he
Poſt. 210. ſhould be committed to the Tower, and ſhould pay two thouſand pounds Fine, and upon his enlargement ſhould find Sureties for his good behaviour: And againſt Hollis, That he ſhould pay a thouſand marks, and ſhould be impriſoned, and find Sureties, &c. And againſt Valentine, That he ſhould pay five hundred pound Fine, be impriſoned, and find Sureties. Note, that afterward in the Parliament, 17. Car. It was reſolved by the Houſe of Commons, that they ſhould have recompence for their Damages, Loſſes, Impriſonments, and Sufferings ſuſtained for the Services of the Common-Wealth in the Parliament of 3 Caroli. Vide poſtea fol. 604. The Votes of the Houſe of Commons and reſolution of the Lords concerning the Illegality of this Judgment, Anno Dec. nono Car. ſec.

Termino

Termino Paſchæ, anno ſexto *Caroli* Regis, in Banco Regis.

Thomas Pewes Caſe.

THOMAS PEW was arraigned for the murder of one Gardinor; and upon evidence it appeared, That the ſaid Gardiner was a Bayliff ſworn and known, and under-Bayliff to the Dean and Chapter of Weſtminſter: And he having the Sheriffs Warranty to arreſt the ſaid Thomas Pew, upon a Capias out of the Common-Bench, and ſeeing him in Sheerlane within the liberty of Weſtminſter, the ſaid Pew ſeeing him come towards him, drew his Sword, and the ſaid Gardiner approaching to lay hold upon him (not uſing any words of arreſt, as was proved) Thomas Pew ſaid (as it was proved upon examination of two Witneſſes before the Coroner) Stand off, Come not neer me, I know you well enough, Come at your perill; and the Bayliff taking hold of him, he thruſt him with his Sword, that he died immediately. It was held by all the Court, that it was murder: For he coming as an Officer to arreſt, and not offering any other violence or provocation, although he uſed not the words I arreſt you, or ſhewed him any Warrant, becauſe peradventure he had not time, nor was demanded the cauſe, the Law preſumes it to be malice and murder in him, that ſo kills one, being an Officer and coming to execute Proceſs. 1. 3 Inſt. 52. Co. 9. 67. b. 2 Cr. 280. Poſt. 538.

Sir Stephen Bord *verſus* Cudmore.

ERror of a Judgment in Debt in the Common-Bench. The Error aſſigned was, becauſe Debt was brought in London by Cudmore as aſſignée J. S. of a Reverſion of Land, in the County of Somerſet, upon a Leaſe for years made at London of the ſaid Lands, rendring the rent of twenty pounds yearly at Temple Church London, ſuppoſing the Leaſe to be made at the Pariſh of St. Mary Bow in Warda de Cheap London, for two years rent behind after the aſſignment of the Reverſion and attornment thereto; whereas the Action ought to have been brought in the County of Somerſet, where 2.

where the Land lies, becauſe the privity of Contract failing by aſſignment of the Reverſion, he is only to maintain the Action upon the privity in Law, for the intereſt of the Reverſion; and that ought to have been brought in the County of Somerſet, where the Land lies. And this was agreed on the other ſide, unleſs the rent had been reſerved payable at London; and in that caſe the Action may be laid in London; for payment might have been there pleaded. And, upon Nil debet, thoſe in London might beſt take conuſance of the payment; and therefore the Judgment was well given, and not Error. But all the Court conceived, for as much as the privity of the Contract is gone by the aſſignment of the Reverſion and the Attornment, and the Rent follows the Land, the Plaintiff being only entituled thereunto by reaſon of his having the Land; therefore the Action ought to have been brought only in the County where the Land lies, and not elſewhere; Whereupon the Judgment was reverſed. Vide 16. Hen. 7. 11. Coke 7. Rep. fol. 2. 38. Hen. 6. 15.

Co. 3. 22. a. Poſt. 188. Dier. 40 b. Hob. 37. Ante 143.

James *verſus* Hayward.

3. 2 Ro. 137. 8. Jones 221.

TRespaſs for breaking his Cloſe, and pulling up, and cutting, and caſting down a Gate: The Defendant juſtifies, becauſe the Gate was placed croſs the High-way, and ſo fixed, That the Kings Subjects could not paſs without interruption, by reaſon of the ſaid Gate, to the nuſance of the Kings Subjects; and therefore he pulled up, cut, and caſt down the ſaid Gate to uſe the ſaid way. The Plaintiff ſhews that he ſet up two poſts of each ſide of the way, and hung the Gate upon one of the ſaid poſts, for the preſervation of the Springs of the Wood there, from Cattle, ſo as the Subjects might paſs the ſaid way without prejudice or impediment at their pleaſure: And traverſeth, That the Gate was ſo fixed and tyed, that the Kings Subjects could not paſs without interruption by the Gate; and upon that Plea the Defendant demurred. The firſt queſtion was, Whether the erecting of a Gate croſs an High-way, which may be opened and ſhut at the pleaſure of paſſengers, be a common Nuſance in it ſelf, in the eye of Law, It being an open Gate fixed upon hinges, that Subjects may paſs the ſaid way at their pleaſure? And ſecondly, admitting it to be a Nuſance, Whether every one may pull up and caſt down the ſaid Gate at their pleaſure? For the firſt, Hide, Jones, and Whitlock conceived, that the erecting of a Gate (although it be not locked, or tyed, but that every Subject may open it, and have paſſage at his pleaſure) is a Nuſance; for it is not ſo free and eaſie a paſſage as if no ſuch incloſure had been; for women and old men are more troubled with opening of Gates than they ſhould be if there were none. But it ſeemed to me, that it is not any Nuſance in it ſelf, being ſo ſmall a trouble, but much for the publique good, that there ſhould be incloſures for the preſervation of corn and graſs, from Cattle

3 Cr. 320.

Cattle straying. And the Law accounts not such petty troubles to be Nusances: For it appears, That there be many Gates in divers Highways, which have been always allowed: And if it were a Nusance in se, there should not be any Gate; for there cannot be any Prescription for a Nusance; and the multitude of Gates in several ways prove, That it never was accounted to be any Nusance: and 2 Ed. 4. 2. the erecting of a Gate upon the way is pleaded, and to be admitted lawful enough. For the second, they held, that admitting it to be a Nusance, although the usual course is to redress it by Endictment, yet every person may remove the Nusance: And Hide, Jones, and Whitlock allowed, that the cutting of the Gate was lawful; whereupon Judgment was for the Defendant. And Jones said, that for ancient Gates upon Highways, it shall be intended they are by licence from the King, and upon Ad quod damnum sued out of Chancery. But I conceived, that cannot be for a stopping, &c.

2 Cr. 446. Co. Litt. 56. a. 3 Cr. 320. R. 647. Aste 132. 2 Cr. 492.

Spalding *versus* Spalding.

ERror of a Judgment given in Ely. Upon a special Verdict the Case was, that John Spalding had Issue three Sons, John, Thomas, and William: He devised the Land in question to John his eldest Son and the Heirs of his body, after the death of Alice the Devisors Wife; And if John died, living Alice, that Willam shall be his Heir. And he devised other Lands to Thomas and the Heirs of his body, and if he died without Issue, that then John should be his Heir. And he devised other Lands to William and the Heirs of his body; And if all his Sons should die without Heirs of their bodies, that then his Lands should be to the Children of his Brother. John dies having a Son, in the life of Alice, and Alice dies, and William enters upon the Son of John: And whether his Entry were Congeable, was the question? And it was adjudged in the Court at Ely, that the Entry of William the Son of John, in the life of his Brother Johns Son, was lawful: And this point was assigned for Error. And now Hedley Serjeant moved, that the Judgment was well given; for he pretended, this devise being to the Heirs of his body, and if he died, living the said Alice, that William should be his Heir; that it is a limitation to the Estate of John, if he dies in the life of Alice, that then William should be his Heir; for that *tant amounts*, that the Land should remain to William presently; And it is not mentioned, that if he dye, living Alice, without Heir of his Body; so it is a contingent Estate to William, and relied upon septimo Edvardi sexto, title Done, and the Case of Pell and Brown in this Court, Hill. decimo septimo Jacobi rot. 44. But all the Court conceived upon the whole Contert of the Will, that it is to be construed according to the intent of the party, And that the construction shall be, that if

4. 2 Cr. 260. 2 Cr. 591.

John died without Iſſue, living Alice, That then William his youngeſt Son ſhould have it; and it ſhall not be conſtrued (where he limits it firſt to John and the Heirs of his body, that by this limitation he intended, if he died, living Alice, That William ſhould be his Heir) John having Iſſue, and thereby to diſinherit the Heirs of Johns Body: And what was his intent appears by the other parts of the Will, That the other Sons ſhall have other Lands to them and the Heirs of their body; and if they all die without Iſſue, That it ſhall be to his Brothers Children, not meaning to diſinherit any of his Children; And it ſhall not be ſuch a contingent,
2 Cr. 416. remainder or limitation to abridge the former expreſs limitation; Wherefore they all conceived, That during the time John ſhould have Heirs of his Body, William ſhould not have the Land; Whereupon the Judgment was reverſed.

Cule *verſus* Executors of Thorn.

5.
3 Cr. 404. Aſſumpſit. Whereas Thorn the Teſtator, in conſideration that the Plaintiff would marry his Daughter Sarah, promiſed to give him in marriage with her as much as he gave in marriage with any other of his Daughters, and alledges in facto, That he married the ſaid Sarah, And that the Teſtator had three Daughters, Alice married to Elkin, and Anne, & the ſaid Sarah, And that he gave in marriage to the ſaid Elkin, with the ſaid Alice, an hundred pounds, and gave to him a Bond of one hundred pounds, to pay to the ſaid Elkin fifty pounds more at three Months end, after his deceaſe, if the ſaid Alice, or any Iſſue of her body, were then living; and aſſigns for breach of the promiſe, That he had paid unto him only forty pounds in his life, And that he had required of the Defendant his Executor, to whom Aſſets was left, the ſaid fifty pounds reſidue, and a Bond for the payment of fifty pounds more, and averred, That the ſaid Alice had ſuch Iſſue alive; And for not paying of fifty pounds reſidue, and not delivering the Bond, he brings this Action. The Defendant pleaded Non Aſſumpſit, and found for the Plaintiff, and damages aſſeſſed to ſeventy pounds; And moved in arreſt of Judgment, That this breach is not well aſſigned: Firſt, Becauſe he promiſed to give as much as he gave with any other Daughter; and that extends to as much as he gave in Money, and not to the Bond. Secondly, If it extend to the Bond, yet it ought to have been averred, That Sarah, or ſome of the Iſſue of her body was alive, and not that Alice and the Iſſue of her body was alive; And ſo the breach was ill aſſigned; And the damages being entire, Judgment ought to be for the Defendant.
2 Cr. 404, 405. And of this Opinion was all the Court, but chiefly for the ſecond point: But as to the firſt, ſome of them conceived, That it extends only to Money preſently given; but they agreed not therein: But in the laſt they all agreed; whereupon it was adjudged for the Defendant.

Morgan

Morgan *verſus* Green, Adminiſtrator of John Green.

DEbt. And demands one hundred and twenty pounds, and declares that where the Inteſtate was indebted to J. S. in divers ſums of Money, for wares ſold, and that J. S. became a Bankrupt, and by the Commiſſioners of Bankrupts, was ſo adjudged: And this Debt amongſt others aſſigned to the Plaintiff, being a Creditor, And that the Inteſtate died; whereupon he brought this Action againſt the Adminiſtrator, &c. Upon demurrer it was argued by Germin for the Plaintiff, and by Stone for the Defendant, and after argument adjudged, That this Action lies not: For Debt upon a ſimple Contract lies not againſt an Executor or Adminiſtrator; And although it was alledged, it being aſſigned by the Commiſſioners, is quaſi a Debt upon Record, and the Plaintiff inabled to this Suit by Act of Parliament; and therefore Gager of Law lies not, And that for Debt forfeited to the King by the Common Law, no Law-gager lies, as is the common experience in the Exchequer, where ſuch Debts are forfeited and ſued. Yet the Court held clearly, That the being aſſigned by the Commiſſioners doth not alter the Law, but that againſt an Aſſignee *ley gager* lies; So againſt ſuch an Adminiſtrator, this Action lies not; Wherefore it was adjudged for the Defendant. 6. Jones 223. 2 Cr. 47. Moor 206. Co. Litt. 295. a. Co. lib. 4. f. 95. a 2 Cr. 105.

Weſt *verſus* Treude, Hill. 5 Car. rot. 318.

ACtion *ſur le* Caſe: Whereas he was, and yet is poſſeſſed of a Leaſe for divers years, ad tunc & ad huc ventur. of an houſe, and ſo poſſeſſed, demiſed it to the Defendant for ſix Months; and after the ſix Months expired, the Defendant being permitted by the Plaintiff to occupy the ſaid Houſe for two Months longer, That the Defendant during the ſaid time, pulled down the Windows, and divers other parcels of the Houſe, and made great waſte therein to the prejudice of the Plaintiff; whereupon he brought this Action. The Defendant pleaded Not guilty, and found againſt him, and moved by Stone in arreſt of Judgment, That this Action lies not; For it was the Plaintiffs folly, to permit the Defendant to continue in poſſeſſion, and to be Tenant at ſufferance, and not to take courſe for his ſecurity? And if he ſhould have an Action, it ſhould be an Action of Treſpaſs, as Littleton. If Tenant at will hath deſtroyed the Houſe demiſed, or Sheep demiſed, an Action of Treſpaſs lies, and not an Action upon the Caſe. But all the Court conceived, That an Action of Treſpaſs or an Action upon the Caſe may be well brought at the Plaintiffs election; and properly in this Caſe, it ought to be an Action upon the Caſe, to recover as much as he may be damnified, Becauſe he is ſubject to an Action of Waſte; and therefore it is reaſon, that he ſhould have his remedy by an Action upon the Caſe; Whereupon 7. Jones 224. Sect. 71. Co. lib. 5. f. 13. b 3 Cr. 461.

rule was given, That Judgment ſhould be entred for the Plaintiff.

Bachelour *verſus* Gage, Executor of Gage.

8. Jones 223. COvenant. Whereas by Indenture bearing date &c. betwixt the Plaintiff and the Teſtator of the Defendant, Teſtatum exiſtit, That the Plaintiff demiſed ſuch a Meſſuage or Tenement with a Garden, in the Pariſh of Saint Martins in the Fields, adjoyning to the Plaintiffs Houſe to the Teſtator, for term of 21. years. And the Teſtator, by the ſame Indenture, covenanted for himſelf, his Executors and Aſſigns, That he would not erect any building in the ſaid Garden to the prejudice of the Plaintiffs light. The Plaintiff alledges in facto, That ſuch an Aſſignée of the Teſtators, againſt that Covenant, had erected an Houſe in the ſaid Garden, to the prejudice of the Plaintiffs lights in his Houſe adjoyning, for which, &c. The Defendant pleads, That the ſaid Leſſée aſſigned over his term to one J. S. who entred and paid his rent to the Plaintiff, and the Plaintiff accepted him for his Tenant. And therefore demanded Judgment ſi actio, whereupon it was demurred. And now this term 'twas argued by Wild for the Defendant, and by Crawley Serjeant for the Plaintiff. And for the Defendant: Firſt, That this Covenant lies not againſt the Executor of the Leſſée, For he having aſſigned over his term, and the Leſſor having accepted the rent of the Aſſignée, The privity of contract is determined, eſpecially it being a contract which concerns an act to be executed upon the Land, and therefore runs with the Land, and he cannot have an Action againſt the Leſſée himſelf or his Executors. And as an Action of Debt lies not againſt the firſt aſſignée, ſo covenant lies not: But all the Court conceived, That inſomuch as it is an expreſs Covenant, that he ſhall not build, it ſhall bind him and his Executors, and no aſſignment nor acceptance of the rent by the hands of the aſſignée, ſhall take from him the advantage of ſuing him or his Executors upon an expreſs Covenant, No more than if a Leſſée had obliged himſelf in an obligation to pay his rent, his aſſignment over of his term and the acceptance of the rent by the Leſſor, of the Aſſignée, ſhall not take from him the advantage of the obligation. See for this, the caſe of Brett againſt Cumberland. Secondly, It was moved, that this declaration was not good, becauſe it is by ſuch an Indenture, Teſtatum exiſtit, and he doth not ſay expreſly, that dimiſit & convenit. And compared it to the caſe of Browning and Beſton, Plowd. 141. Where it is Continetur in tali Indentura, &c. Et 2 Ed. 4. 21. But all the Court conceived, It is good enough; and the uſual courſe in this Court is to declare in this manner, that by ſuch an Indenture Teſtatum exiſtit, &c. Thirdly, Becauſe it is declared that he demiſed meſſuagium

Co. 5. 16. b. Co. 3. 24. b. Poſt. 280. Ante f. 184.

Poſt. 580.

2 Cr. 522.

2 Cr. 522.

2 Cr. 382. 3 Cr. 195. Pl. Com. 126. 8.

um sive tenementum, which is uncertain, sed non allocatur: For true it is, that so it ought not to be in an Ejectione firmæ, or an Endictment upon the Statute of 8 Hen. 6. wherein he is to have possession: But here it is only a recital of the words of the Lease, and to have damages only; Whereupon it was adjudged for the Plaintiff. 2 Cr. 621, 633. 2 Cr. 124.

Bethyll *versus* Parry.

ERror of a Judgment in Carnarven. The Error assigned was, because that in 12 Jac. a Venire Facias was returned in this manner, Per *Thomam Ravenscroft* Vicecomitem. Istud breve cum panello annexo mihi deliberat' fuit, per *Thomam Hanmer* Militem, nuper Vicecomit' in exitu ab officio suo. Et sic indorsatur, Thomas Hanmer Miles, nuper Vicecomes, which is not good; For it appears that it was returned by one who had no Authority, for in saying nuper Vicecomes, excludes him, that he was not Sheriff when he made the Return: And then it is without Authority, and as no Return, or as if it had been returned with a blank; for then it should be ill by the Statute of York, 12 Ed. 2. cap. 5. before the Statute of 21 Jac. which aids such returns after Verdict, Vide Co. lib. 5. fol. 41. The case betwixt Rowland and James, where, by reason of a blank returned, The trial was held ill, but Hide, Jones, and my self held, That it was good enough; For it appears by the Record, That he was Sheriff next before Thomas Ravenscroft; For the Plaintiff, at the Assises in July before, put in his challenge, That Thomas Hanmer, then Sheriff, was Cousin to him, and shewed how; and therefore prayed a Venire Facias to the Coroners, and the Defendant denied the Cousinage: wherefore the Venire facias was awarded to the Sheriff. And then when, in exitu officij sui, he delivered that Writ, returned Thomas Hanmer Miles, It is sufficient to satisfie the Statute; For he needed not alledge his name of Office; For at the Common Law, it was good without returning his name thereto. Now the Statute appoints, That he who returns, shall add his name to the Return, which is sufficient, if it be his Christian and Sirname, and his name of Office is not requisite, as Plow. fol. 63. Dive and Manninghams Case. Then being returned by him, and his name to it, The addition of nuper Vicecomes (for it shall not be intended, That he returned it when he was not Sheriff, but that he returned it when he was Sheriff) and made that Addition when he delivered it to the new Sheriff) shall not make the return void: And divers presidents were shewn, where they were returned in the same manner. All which should be reversed if there should be a reversal hereof, and when by any way or construction the Court may intend it to be good, They so shall intend it. And, as it was agreed, That this word nuper Vicecomes doth necessarily imply, that he was not then Sheriff, at the time 9. 2 Cr. 188. Mo. 65. Post. fol. 570.

time of the delivery of the Writ to the new Sheriff; So it is to be conſtrued, That by the word nuper Vicecomes he was Sheriff at the time of the Panel made. And if he had returned it without
Poſt. 351. thoſe words, nuper Vicecomes, it had been clearly good, then the addition thereof ſhall not make it ill. But Juſtice Whitlock ſeemed to doubt thereof, wherefore the Court would further adviſe.

Shepheards Caſe.

19. TResPaſs of his Cloſe breaking. The Defendant juſtifies, becauſe it was the Freehold of J. S. and he entred by his command. The Plaintiff entitles himſelf, becauſe the place where, is cuſtomary Land, parcel of ſuch a Manor, whereof J. S. is ſeized in Fee, &c. and demiſable by Copy at will in Fee; And that J. N. was thereof ſeized in Fee by Copy, at the will of the Lord of the Manor, according to the cuſtome, &c. and died ſeized; ſo as it deſcended to two Daughters, as Heirs of the ſaid J. N. And that at ſuch a Court, Dominus conceſſit eis, extra manus ſuas, &c. Habendum et tenendum tenementa prædicta, to the ſaid daughters and their heirs, whereby they were ſeized in Fee, and demiſed to the Plaintiff for years. And Iſſue being joyned upon a collateral matter, and the Verdict given for the Plaintiff, it was moved in arreſt of Judgment, that the Plaintiff had not made a good Title; for none may intitle himſelf to any Coyhold, But he ought to ſhew a grant thereof: And therefore he ſhewing ſuch a one was ſeized in Fee, with-
2 Cr. 103. out ſhewing the Grant thereof, 'twas not good. And of that opinion was all the Court, that it was no good manner of pleading: But
Ante 54. Hide, Jones, and Whitlock conceived, It was but a default in the form; and the Iſſue being taken upon a collateral matter, and found for the Plaintiff, it is helped by the Statute of Jeofayls; whereupon it was adjudged for the Plaintiff.

Naſh *verſus* Preſton.

11. A Bill in Chancery was referred to Juſtice *Jones* and *my ſelf*, to conſider, Whether one ſhould be relieved againſt *Dower*, demanded, &c. where the caſe appeared to be, That *J. S.* ſeized in Fee by Indenture inrolled, bargains and ſells to the Husband for one hundred and twenty pounds, in conſideration, That he ſhall redemiſe it to him and his Wife for their lives, rendring a Pepper Corn; And with a condition, That if he paid the hundred and twenty pounds at the end of twenty years, the bargain and ſail ſhall be void. He redemiſeth it accordingly, and dies: His Wife brings *Dower*. Whether

ther the Plaintiff ſhall be relieved againſt this title of *Dower*, was the queſtion? And, although we conceived it to be againſt equity and the agreement of the Husband at the time of the purchaſe, That ſhe ſhould have it againſt the Leſſees: For it was intended, they ſhould have it redemiſed immediately unto them, as ſoon as they parted with it; and it is but in nature of a Mortgage. And upon a Mortgage if Land be redeemed, the Wife of the Mortgagee ſhall not have Dower. And if a Husband takes a Fine *ſur cogniſance de droit come ceo, and renders arrear*; Although it was once the Husbands, yet his Wife ſhall not have Dower: For it is in him and out of him *quaſi uno flatu*, and by one and the ſame Act. Yet in this caſe we conceived, That by the Law ſhe is to have Dower: For, by the bargain and ſale, the Land is veſted in the Husband, and thereby his Wife intitled to have Dower. And when he redemiſes it upon the former agreement, yet the Leſſees are to receive it ſubject to this title of Dower; And it was his folly, that he did not conjoin another with the Bargainee, as it is the ancient courſe in Mortgages. And when ſhe is Dowable by Act or Rule in Law, a Court of Equity ſhall not barr her to claim her Dower; For it is againſt the Rule of Law, *Where no Fraud or Covin is, a Court of Equity will not relieve.* And upon conference with other the Juſtices at *Serjeants Inn*, upon this queſtion, who were of the ſame judgment, we certified our opinion to the Court of *Chancery*, That the Wife of the Bargainee was to have Dower, And that a Court of Equity ought not to preclude her thereof.

1 Rol. 474.

Co. Litt. 31. b. 2 Cr. 615.

Termino

Termino Trinitatis, anno sexto *Caroli* Regis, in Banco Regis.

Taylor *versus* Starkey, Hill. 5 Car. rot. 385.

1. Hutt. 104. Het. 139, 143. ERror of a Judgment in the Common Bench, in an Action upon the Case for words. Whereas the Plaintiff was, and is an Attorney of the Common Bench; That the Defendant, the first of June, quarto Caroli, spake of the foresaid Plaintiff these words, He is a common Barretor, a Judas, a Promoter; And primo Julij quarto Caroli, spake these words of the Plaintiff, He is a common Barretor, a Cheater, and I will make him to be barred of his Practice. The Defendant pleaded Non culp. and found against him for the first words, and damages to fifty pounds: Ante 40. Mo. 61. And Non culp for the words supposed to be spoken primo Julij quarto Caroli: And Judgment being given for the Plaintiff, as to the first words, and the fifty pounds damages; and for the Defendant, for the second words, it was assigned for Error by Taylor of Lincolns Inn, That an Action lies not. For if it were spoken 3 Cr. 171. of a common person who was not an Officer, That he is a common Barreter, an Action lies not, and so adjudged in this Court decimo nono Jacobi. And here, although he be an Attorney who brings this Action, yet not appearing there was any such speech of him as Attorney, or to scandalize him in his place, the words are spoken of him as of a common person; For the last words which concern his Post. 460, 510. Practice, the Defendant is found Non culp. But all the Court Hob. 117. conceived the Action well lies; for it is a great slander to an Attorney to be called and accounted a common Barretor, who is a maintainer of Brabbles and Quarrels, and a Quarreller and Fighter; Hob. 140. And words are to be construed secundum conditionem personarum of whom they are spoken; Whereupon the Judgment was affirmed.

Johns and Robinson *versus* Dodsworth.

2. ERror of a Judgment in an Appeal of *Maihem* in Durham: The Error assigned, Because the Plaintiff declaring there, in an Appeal against them, That they, with a third, made the *Maihem*: They pleaded several Pleas, whereupon several Issues were joyned, and Verdict for the Plaintiff, and against Johns upon the Trial fifty pounds damages were found, and against Robinson one hundred pounds damages; And the Plaintiff prayed Judgment

ment against both, for the one hundred pounds damages and costs, and had it; And now Error is brought and Assigned, Because the Plaintiff hath Judgment for the one hundred pounds damages, and doth not release the damages for the fifty pounds. But the Court conceived it to be no Error; For the Judgment being for the one hundred pounds by the election of the Plaintiff, it is a Wayver of the other damages, and he cannot have both; therefore he needs not release the damages of fifty pounds; Whereupon the Judgment was affirmed. Ante 55. Post. 243 Col. 11. 7. a.

Simonds *versus* Mewdesworth, Hill. 3. Car. rot. 378.

3. DEbt. Upon an Obligation quinto Octobris decimo septimo Jacobi, of three hundred pounds conditioned, for the payment of two hundred and ninety pounds in April following: The Defendant pleaded, That in December, decimo septimo Jacobi, by Indenture, it was agreed betwixt the Plaintiff, and divers other Creditors of the Defendants (to whom the Defendant was indebted in divers and several sums of money particularly mentioned) That the Defendant by Indenture of bargain and sale, should assure divers Lands in the County of Lincoln, to nine of the Creditors, to be sold by them, and the money to be paid amongst the Creditors, and assigned to them a Lease for years of the customs of Wines, and certain other sums of money, which the said Creditors by the said Indenture accepted, and alledges in facto, That he by Indenture, bargained and sold the said Land to the said nine persons, & made a Letter of Attorny to receive the sums of money; And thereupon the Plaintiff demurrs, Because that the Indenture sounds in nature of a Covenant; and if so, it shall not be in satisfaction, being in it self no satisfaction, nor pleadable in satisfaction of that Debt: Also admitting it had been a good satisfaction, if performed, yet part thereof not being performed, it is clearly no barr to this Action; Whereupon it was adjudged for the Plaintiff; For agreement without satisfaction is to no purpose. 1 Ro. 471. Ante fol. 85. 2 Cr. 630.

Sands *versus* Trevilian, Mich. 4. Car. rot. 196.

4. ERror of a Judgment in *C. B.* where, Trevilian being Attorny, brought an Attachment of priviledge againg Sands, and demanded against him debt of ten pounds, and declares, That he being an Attorny there, the said Sands retained him to prosecute a Suit in the Common-Bench betwixt one Symms and Worlich, and desired the Plaintiff to be Attorny for Worlich, and Promised to pay him all his fees, and all that he should lay out to Counsel and Officers of the Court in that Suit, and shews, That he laid out such sums, which amount to the money demanded; whereupon he brought this Action. The Defendant there pleaded Nil debet, and found against him, and Judgment for the Plaintiff; Ante 107. 1 Rol. 594.

And now Error assigned, That in this Case debt lies not against him who so intreated him to be Attorney; for there is no contract between them, nor hath he any quid pro quo; But he ought to have had an Assumpsit (because he did it at his request) if he for whom he is retained, doth not pay him his fees: And thereto agreed all the Court; but if he should have debt they doubted: But Rolls for the Defendant, in the Writ of Error, shewed, that he well might bring an Action of Debt, because he retained him, which is a consideration in it self; And he relyed upon 37. Hen. 6. 10. If one intreat a Carpenter to make such a thing for another, or to serve another for such a time, and promiseth him ten pounds, debt lies: So 17. Ed. 4. 5. If one promise one hundred pounds if he will marry his Daughter, he marries at his request, &c. And he shewed a president, 16 Jac. rot. 416. betwixt Bradford and Woodhouse, wherein it was adjudged and affirmed in a Writ of Error, That debt lies; and he said there was a difference where one is retained generally for another with such a promise to pay his fees; and as much as he should expend in the Suit, there debt lies: But if I retain one to be Attorny for another, and promise if the other doth not pay, That I will pay, there if the party, for whom the Retainer is, doth not pay, an Action of the Case lies against me upon my promise, and not an Action of Debt; but here an Action of Debt lies. But all the Court conceived, That no Action of Debt lies here, but an Action upon the Case only: For the Retainer being for another man, and he being Attorny for another man, who agreed to that Retainer, there is no cause of debt betwixt him who retained and the Attorny, and no contract nor consideration to ground this Action; and he who is so retained, may well have debt for his fees against him, for whom he was retained, he having agreed thereto, wherein there cannot be any Wager of Law, but against the Defendant, who is a Stranger to the Suit, and at whose request he took upon him to be Attorny, Debt lies not, as 27 Hen. 8. 24, and in the Case Hill. 38. Eliz. Rolls versus Germyn 'twas resolved; whereupon it was adjudged, That the first Judgment should be reversed.....

2 Cr. 521.

2 Cr. 521. Ante 107.

1 Rol. 594.

2 Cr. 520, 521.

3 Cr. 425. Moor. 366.

And Richardson, chief Justice of the Common-Bench, and Hutton and Harvie Justices of the Common-Bench, being moved herein, said, that this point was never moved before them; And they were of the same opinion, That Debt lies not, but only an Action upon the Case. Ante pag. 170.

Ante 159.

Poynter *versus* Poynter.

5. Pl. C. 305. a.

ASsumpsit. Whereas the Plaintiff and Defendant having communication, That the Plaintiff should espouse the Daughter of the Defendant; the Defendant promised, if the Plaintiff ad instantiam Defendentis would marry the Defendants Daughter, he would pay unto him twenty pounds, and give unto him twenty French pieces towards their Wedding Dinner; And alledges

alledges in facto, That he married the Defendants Daughter, and had required him to pay the said twenty pounds, and that he had not paid it, And that the twenty French pieces amounted to six pounds English money, and the Defendant had not paid them. Upon non Assumpsit pleaded, and found for the Plaintiff, it was moved by Berkley Serjeant in arrest of Judgment, That the Declaration is not good; for the promise is but conditional, if he ad instantiam of the Defendant, married his Daughter, &c. and he alledges, that he married the Defendants Daughter, but he doth not say ad instantiam Defendentis: So it being a Condition precedent, if he hath not averred performance thereof, there is no cause of Action. But all the Court conceived, upon this agreement, to marry the Daughter ad instantiam Defendentis, and he marrying her, it shall be intended to be ad instantiam Defendentis, without averring, that he after, at the instance of the Defendant, married her. A second Exception was, Because the promise is, To give unto him twenty French pieces, that is not twenty French Crowns, for there may be other pieces, sed non allocatur; For French Crowns are the common Coyn of France, and here known, And it shall be intended according to our usual speech; Whereupon it was adjudged for the Plaintiff. 2 Cr. 404.

Harlow *versus* Wright.

DEbt. Upon an Obligation conditioned, That if the Obligée his Executors and Assigns, from the time of the Obligation, may enjoy such Land by virtue of such a Lease made unto him by the Obligor, That then, &c. The Defendant pleads, That post Obligationem, untill the day of the Bill, the Plaintiff had enjoyed that Land. Upon this Plea the Plaintiff demurrs. The first Exception was, Because the Defendant doth not say a die confectionis scripti obligatorii, & semper post confectionem scripti obligatorii; for it may be the Plaintiff enjoyed it post confectionem scripti obligatorii, but non semper post; sed non allocatur; For a Barr is good to a common intent, and it shall be taken, that he always enjoyed it unless the contrary be shewn, which must come on the Plaintiffs part. A second Exception was, Because the Defendant did not plead, That the Plaintiff and his Assigns enjoyed it according to the words of the Condition; and it was said, That the Plaintiff had in truth made an Assignment, sed non allocatur; for it shall not be intended the Plaintiff had made an Assignment, unless he himself shews it, And it ought to be shewn on his part; Whereupon rule was given, That Judgment should be entred for the Defendant. But it was moved to have the Plaintiff discontinue his Suit, for otherwise he should be barred of his debt, whereas he had good cause of Action: So the Court adjourned it untill the next Term, that in the interim he might discontinue. 6. Ante 6.63. Co. 5. 121. a. 2 Cr. 35.

Salmon *versus* Percivall.

7. Jones 226. 2 Ro. 561. 2. TRespas of battery, wounding, and imprisonment. The Defendant quoad wounding pleads Non culp. Quoad the battery and imprisonment justifies, Because, being a Serjeant of the Mace in London, by custom there upon a Plaint of Debt entred in any of the Counters against any, he may arrest him against whom such plaint is entred, and carry him to prison, untill he find Bayl; And justifies by reason of a Plaint entred, &c. The Plaintiff replies, that after the arrest, he tendred unto him sufficient Bayl, viz. J. S. and J. D. and notwithstanding he detained him in Prison, &c. Et hoc, &c. The Defendant takes issue, That he did not tender him Bayl, And it was found against him for both Issues, and entire damages given, and moved in arrest of Judgment, That having justified the Arrest and Imprisonment, the tender of Bayl is not material; for he is not the party who ought to accept Bayl, but the Judge in Court: therefore the Issue as to this point is frivolous. And although Germin, for the Plaintiff, objected, that because he refused to take Bayl, he was a Trespasser ab initio, As he who enters into a Tavern and takes a Cup away; Or where Tenant at will pulls down the house; yet all the Court conceived, that when he justifies the Arrest and Imprisonment, although he might have accepted Bayl (which they all agreed, he could not) and refused, that doth not make the Arrest and Imprisonment tortious, to have Trespas; But he might upon the matter have had an Action upon the case for detaining him in Prison, after Bayl tendred, then when damages are given as well for the Battery and Imprisonment, as for the Wounding, the Plaintiff ought not to recover; whereupon it was adjudged for the Defendant.

2 Cr. 64. 3 Cr. 77. Co. 8. 146. b. R. 176.

Dow and others *versus* Golding, Hill. 5. Car. rot. 125.

8. TRespas *sur* Demurrer. The question was, whether the Lord of a Mannor may assess two years and half value of Copyhold land according to racked rent for a fine, upon surrender and admittance, & for non payment enter for forfeiture? And all the Court conceived, that one year and a half of rent improved, is high enough; and the Defendant assessing two years and a half, it is unreasonable; and therefore the Plaintiff might well refuse the payment thereof, and consequently the entry of the Defendant for a forfeiture not justifiable; whereupon it was adjudged for the Plaintiff.

Co. Lit. 59. b. Lib. 4 27. b. Lib. 11. 44. a.

Hughs Case.

9. Jones 226. HUghs being taken upon an Excommunicato Capiendo, Because he was condemned in the Court of the Vice-Chancellor of Oxford in costs, and had not paid them; the Writ of Excommunicato

nicato Capiendo being awarded upon a Significavit, returned into Chancery and delivered here into Court, according to the Statute of quinto Elizabethæ cap. 23. he being arrested thereupon, exception was taken because it is not expressed to be for some of the causes mentioned in the Statute of quinto Elizabethæ, and so void. And it was demurred thereupon. And Littleton moved, that although the Significavit doth not mention any of the causes in the Statute, but is for other causes (viz. for Costs) yet the Excommunication is good. But if any Capias with Proclamations and penalties therein be awarded, these penalties and forfeitures be void, unless the Significavit express it to be for one of the causes mentioned in the said Statute. But the Excommunication it self is good enough. And so, tertio Caroli, it was resolved in this Court upon long deliberation and debate, in the Case of one Brown, Although some while before, upon suddain motion and not well observing the words of the Statute, some had been discharged of such Excommunicato Capiendo: And Jones and Hide said, they well remembred Browns Case to be so resolved. But none being there of the part of Hughs, they gave further day to be advised thereof.

3 Cr. 144.

Infra. fol. 199.

Benl. 100. Lat. 174.

Lord Brook *versus* Lord Goring.

UPon the Lord Keepers request, All the Justices and Barons were assembled for their resolution in the Case betwixt the Lord *Brooks* and the Lord *Goring*, which was thus. Queen *Eliz. anno decimo nono Regni*, granted to *Fulk Grevill* Esq; the Office of the Clerk of the Councel of the Marches of *Wales* for his life; & by another Patent, *anno vicesimo quinto Eliz.* granted unto him the office of Secretary there, for his life: And *in primo Jac. Regis*, without recital of these Patents, the said King grants the said offices to Sir *Fulk Grevill* then Knight, for his life: And after, *in nono Jac.* the King reciting the said Patent of *primo Jacobi*, grants those offices to *Adam Newton* for his life, when, after the death, surrender, or forfeiture of the said Sir *Fulk Grevill*, they should become void. And after, *in decimo quarto Jacobi*, by another Patent, reciting the Patents of *primo & nono Jacobi* and omitting the Grants *in decimo nono & vicesimo quinto Elizabethæ*, the said King granted the said offices to *John Venor* and *John Mallet*, *Habendum* for their lives, *cum post mortem* of the said *Fulk Grevil* or *Adam Newton*, surrender, forfeiture, or other determination, *vel alio quocunque modo*, the said offices should be void, or should come to the Kings hand to dispose, with a *Non obstante*, a *male nominando*, or a *male recitando prædicta officia*; *Et non obstante male recitando, male nominando, vel non recitando, aliquod donum vel concessionem præantea factum de officiis prædictis.* And whether the Patent of *decimo quarto Jac.* be good, or not, was the question? And it was argued several days, *viz.* by *Hedley* Serjeant against the Patent *decimo quarto Jac.* & by *Noy* for the Patent.

106

And

And at another day by *Banks* againſt the Patent, and by *Finch* Serjeant for the Patent. And it was agreed by all the Juſtices and Barons, That the Patent of *primo Jac.* was meerly void; For firſt it was agreed by the Counſel of each ſide, That the Patents of *decimo nono & viceſimo quinto Elizabethæ* were good and nothing objected againſt them. Then Sir *Fulk Grevill*, being the Patentee, and alive, and he accepting a new Patent *in primo Jacobi*, without reciting the former Patents, and not any *Non obſtantes* therein, it is clearly void; as it was agreed in *Harris* and *Wings* Caſe, That if Leſſee for years of the Queen take a new Leaſe for years of the ſame thing, without recital of the former Leaſe, it is meerly a void Leaſe, and no ſurrender of the former Leaſe: And it is ſtronger in this Caſe; For the grant of an office cannot be ſurrendred by the taking of a ſecond Grant; for there is not any revocation thereof. Secondly, It was agreed by all the Juſtices and Barons, That the Patent of *nono Jac.* reciting the Patent of *primo Jac.* as a good Grant, which is void, and no *Non obſtante* therein, this Grant is meerly void. Thirdly, The principal queſtion was, Whether the clauſes of *non obſtante* in the Patent of *decimo quarto Jac.* makes it good (For otherwiſe without a *Non obſtante*, it was agreed by them all, That it was void) becauſe it recites the two Patents which are void, & omits the recital of the two Patents which are good: And makes the *Habendum* after the death or determination of the ſaid Patentees, which are void; So the King is deceived in his Grant, and miſ-informed. And whether the *Non obſtante* doth help it, was the principal queſtion? And as to that point *Hide* chief-Juſtice held clearly, That the *Non obſtante* helps it and makes it a good Patent, becauſe the King relinquiſheth the advantage of *non recital or falſe recital*, and intends to grant it by whatſoever means the ſame ſhall become void: And *Jones* ſeemed to doubt thereof, and would not deliver any opinion herein: But *Richardſon*, chief Juſtices of the Common-Bench, *Hutton*, *Harvey*, and *Damport*, Juſtice of the Common-Bench, *Denham*, *Trevor*, and *Vernon*, Barons of the Exchequer, *Whitlock* and *my ſelf*, Juſtices of the Kings Bench, conceived, That this Parent of *decimo quarto Jacobi* is meerly void, by reaſon of thoſe miſrecitals; which are not properly miſrecitals or falſe recitals, but rather falſe informations or ſuggeſtions, whereby the King was deceived. For by intendment, The King conceived thoſe Grants were good, which are void, And granted thoſe Offices after the determination of the ſaid Grants, *vel alio quocunque modo*, &c. So the King is deceived, and the *Non obſtante* ſhall not aid ſuch falſe informations and falſe ſuggeſtions. *Co. 6. fol. 55. Seignior Chandoys caſe, 3. Eliz. Dyer* 197. *Blagues caſe.* But there was not any Certificate made of theſe Judges opinions, becauſe the parties compounded.

3 Cr. 231. Co 5. 53. b.

Poſt. 259.

Moor. 449.

Co. 4. 35. b.

Hob. 229.

The King and Codrington *verſus* Rodman

11. Jones 227. 2 Ro. 178.

EXcommunicato Capiendo, upon a ſentence in the Delegates, for coſts in caſtigatione Morum. The Sentence being before, viceſimo

simo primo Jacobi, divers Capias, with Proclamations and penalties, issued, according to the Statute of quinto Elizabethæ. And the Defendant, being now taken, pleaded, quoad all the penalties and forfeitures, that it is not for any of the causes within the Statute; therefore quoad them he ought to be discharged: And so it was held by all the Court. Quoad the Excommunicato Capiendo he pleaded, that the said offence and contempt, for which the Excommunication was awarded, was before 21. Jac. and pleads the general Pardon of vicesimo primo Jacobi in discharge thereof: And it was thereupon demurred. And now Germin for the Plaintiff moved, that this Excommunication, being for costs taxed for the party, the party having interest in the costs, being taxed before the Pardon, the general Pardon shall not take away the costs (which was agreed by the Court:) For a private person being interessed in them, the Pardon shall not take them away. Then Germyn moved, that as the Costs were not taken away, so no more is the Excommunication, which is the means to enforce them to be paid; and it is as an Execution at the Common-Law, and shall not be discharged. But Grimston for the Defendant moved, that this Excommunication before the Pardon, is but for a contempt to the Court, And all contempts are discharged as contempts in Chancery, Star-Chamber, and other Courts are discharged, by the general Pardon, not being excepted therein, Co. lib. 8. fol. 69. Trollops Case. And all the Court (absente Hide, chief Justice) conceived, That this Excommunication is discharged by the Pardon; and all contempts before the Pardon are discharged, and all the Sentences for the crime, except only the Costs, for the payment of which, he ought to have new Process. But the Court would advise thereof afterwards, viz. Pasc. 7. Car. being moved again, and a president shewn in Court, Mich. 2. Car. rot. 64. where it was adjudged to be discharged: It was so adjudged here likewise.

Ante 197.

Ante 9.47. Co. 5.51.b. 2 Cr. 159.

2 Cr. 212. 2 Cr. 159.

Jones 227.

Smart *versus* Doctor Easdale.

ACtion for words. Thou wast perjured, and hast much to answer for it before God. Exception after verdict in arrest of Judgment, For that it is not, That he spake it in auditu complurimorum, or of any one according to the usual form. Secondly, That the words Thou wast perjured, is in the time past, and is extenuated by the subsequent words; quasi diceret, although not answerable before men, yet before God; sed non allocatur: For it is not material how long since it was spoken, for the fault remains. And it being found by verdict that he spake them, it is not material although he doth not say in auditu plurimorum; Whereupon it was adjudged for the Plaintiff.

12.

Post. fol. 317.

Termino

Termino Michaelis, anno ſexto *Caroli* Regis, in Banco Regis.

1. *Memorandum*, that the three laſt Returns, *viz. Octa. Quindena*, & *Tres Michael.* of this Term were adjourned by a Writ of Adjournment directed to the Juſtices of every Court. And whereas it was my turn, being the *puiſny* Judge, to keep the Eſſoynes, Juſtice *Jones* being at his houſe in *Holborn* for other buſineſs, went the firſt day of *Octa. Michaelis* to *Weſt.* & before him the Writ was read of Adjournment of all the ſaid returns, & he adjourned the Term, for the Kings Bench, And Juſtice *Damport*, *puiſny* Judge of the Common Bench, adjourned the Term in the Common Bench; And Baron *Vernon* in the Exchequer. And the day of Eſſoyns of *Menſe Mich.* being 27. of *October*, I kept the Eſſoyns for the Kings Bench; and Juſtice *Damport* for the Common Bench; and Baron *Sotherton* for the Exchequer, and did no more the ſame day: And none of the Juſtices of the Kings Bench or Common Bench ſate, nor the Lord Keeper in the Chancery, untill *quarto die poſt*, which was *die Sabat.* 30. *Octob.* And becauſe the Major of *London* was to be ſworn in the Exchequer by Ancient uſage *Craſtino poſt feſtum ſanctorum Simonis & Judæ*, the Lord Treaſurer & Barons of the Exchequer ſate in the Exchequer 29 *Octob.* and there the Major was ſworn; but no great feaſt for the Major according to the ancient uſage, was kept, the Plague being in *London*, and great ſcarcity of Corn that year; for which cauſes by Proclamation, the feaſts of the Companies in *London* were prohibited.

Dier 225. b. 2 Cr. 17. Ant. 14. 102.

Hulm *verſus* Heylock, ante pag. 129

2. Ejectione firmæ, upon a Leaſe made by Henry Green of land in Old-ſtreet. Upon evidence at the Barr the Caſe was, John Metcalf ſeized of the land in queſtion, deviſeth it to John Gallant an Infant, of the age of three years, in fee, by the name of his Tenement called the White-Swan, and dyes. Henry Metcalf, the ſon and heir of John Metcalf, enters and levies a Fine thereof in decimo ſexto Jacobi, with Proclamations, in the life of John Gallant, being within age; who after dyes, being within age, the wife of Heylock being his ſiſter and heir. The queſtion was moved by Germin, That this Fine, although five years paſſed without claim, ſhall not hurt the ſaid Heylocks wife (eſpecially being ſhe was a *Feme covert*) Becauſe ſhe claimed by a deviſe; And before entry the fine is levyed; ſo as her eſtate was not turned into a right, as it hath been reſolved, That if one enters after a Deviſe, before the Deviſee enters,

ters, and dies seised, that discent shall not take away the entry: So that Fine and Nonclaim shall not bar where it is not turned into a right. But all the Court conceived, although a discent in that case shall not bind; for then they might not maintain any Action, never having had any seisin, and so they should be without remedy, where there is only a discent and no binding matter of bar; yet a Fine and Nonclaim, which is a binding in Law, shall bar the *Baron* (who suffered the five years to pass) and all claiming under him and the *Feme* her self, during the Coverture; But the *Feme* shall have new five years after the death of the *Baron*. And so they delivered the Law to be, to the Jury.

Co. 8. 72. b. Co. Litt. 326. a. Ante 157.

3. ENdictment of forcible Entry in Tythes: Where the party *ousted* prays restitution: And whether this Endictment were maintainable, was the question? For it was agreed, That an Assise lyes of Tythes by the Statute of tricesimo secundo Henrici octavi, and they be recoverable as a Lay Inheritance. And Calthrop moved, That the Endictments should be allowed, as well for Tythes as for Rent: And for Rent it appears that forcible Entry lies, by Fitzh. Nat. Brev. 249. b. 20 H. 6. 11. & 22 H. 6. 23. And afterward, absente Hide, Writ of Restitution was granted.

Post. 486. 2 Cr. 18.

Levannes Case.

4. SAmuel Levanne, Administrator of Mary Levanne his sister, was sued in the Spiritual Court in London before the Ordinary, to make distribution of the goods of the Intestate, pretending all the debts of the Intestate, and all Legacies were discharged, and a great surplusage remaining, which was disposable at the pleasure of the Ordinary, and to be divided among the friends of the Intestate. And for this cause Banks, the Princes Attorney, moved for a Prohibition: For by the Statutes of tricesimo Edvardi tertij, & vicesimo primo Henrici octavi, Administration is appointed to be committed to the nearest and faithfullest friends: which being committed, the Ordinary hath no authority to meddle with him to make distribution; For he is an Executor to sue and to be sued, and to dispose of the Goods of the Intestate, as freely as an Executor might where there is a Testament. And it would be an inconvenience to compell him to make distribution: For if afterwards other debts should be discovered, or if he be sued for breach of Covenants, the Administrator should be compelled to answer of his own Goods; and therefore it is reason he should keep the Intestates Goods, to save himself harmless against such Suits. Germin for the Plaintiff in the Spiritual Court moved, That no Prohibition should be granted; For it is reason, when there is surplusage, (it being averred that all Legacies and Debts are satisfied,) that the Administrator should not retain them to his own use, but that they should be distributed amongst the friends of the Intestate: And the

Jones 228.

Ordinary will take security, that if debts be discovered afterwards, there shall be restitution of the Goods to the Administrator as much as will satisfie. But all the Court resolved that a Prohibition was well grantable, Because the absolute interest in the Goods is in the Administrator: And the Administration being committed, the Ordinary hath nothing to do; And he cannot now, as he might at the Common Law, repeal the Administration committed at his pleasure; And it shall not be left to his discretion to provide restitution for debts discovered, for that might be inconvenient; whereupon a Prohibition was granted. See before Fotherbeys Case, Hil. 2 Car. C. B. pag. 62.

Hob. 83. Ante 62. Moor 864. R. 37. R. 640.

Pilchard *versus* Kingston.

5. 2 Rol. 738.

ASsumpsit. Whereas the Defendant having communication with the Plaintiff for the Marriage of one Margery, affirmed that her portion was 600 l. The Defendant in consideration that he would marry the said Margery, and assume that such Land should be assured unto her for her Jointure, promised the Plaintiff that he would pay unto him 100 l. & firmam faceret to him the said portion of 600 l. That he, at the request of the Defendant, espoused the said Margery, and does not say he had assured such Land to her for her Jointure; And that the Defendant had not paid the 100 l. nec firmam faceret to him the said portion of 600 l. The Defendant pleaded non Assumpsit, which was found for the Plaintiff. And moved by Grimston in arrest of Judgment, That the Declaration was not good, Because the Plaintiff hath not shewn, that he might not have the said portion, or that the said Margery had not such a portion: For it may be the said Margery had such a portion in her own hands, or in good debts; and the Defendant did not promise to pay, but to make good the portion; which is performed, if she hath such a portion: And therefore the Plaintiff ought to shew what he wants thereof. And such allegation, That he firmam faceret portionem, is not good. But all the Court held, That the Declaration was good enough; For it pursues the words of the Assumpsit in the breach alledged: And these words *tant amount*, that he would warrant, that he should have such a portion with his wife. And he pleads non Assumpsit: And the Jury found damages; which intends, That they gave damages for so much as was wanting, according to their Evidence; whereupon it was adjudged for the Plaintiff.

Downs *versus* Winterflood.

6.

ATraint. One of the Jurors was returned by the name of Alexander Prescott. In the Resummons (which was in nature of a Distringas) it was Alexandrus Prescott, and he was sworn by that name: And the Verdict of the Petit Jury was affirmed by them. And it was moved in arrest of Judgment, That this was tried

tried by a wrong person, and therefore the Verdict ill, and not aided by any Statute: But the Sheriff and the said Juror being examined in Court, it appears, That Alexander Prescott was his true name, and that he was the Juror intended to be returned and truly sworn, And that there was not any known by the name of Alexandrus Prescott in the same Town; And if it should be amended as the Misprision of the Clerk, by the Statute of vicesimo primo Jacobi, was the question? And it was clearly resolved, That it is not to be aided by the Statute of vicesimo primo Jacobi; for that extends only to the Surnames of the Jurors, or where their additions are mistaken, in which cases if by examination it may appear that he is the same person intended to be returned, the Statute aids that, but not where a Christian name is, &c. And for staying the amendment, the Counsel relied upon the Case in Coke lib. 5. fol. 42. betwixt Goldwell and Parker, where Palus Cheak was returned in the Venire, and the Distringas was Paulus Cheak, which was his true name, yet it cannot be amended, and the Record thereof which was Mich. 33. & 34. Eliz. rot. 419. was shewn in Court, where it appears, That for this cause the Verdict was quashed, and a Venire facias de novo awarded: But note, the Misprision was in the return of the Venire facias, which was the first process and return; but here in the second, which ought to be guided by the former process; wherefore the Court doubted thereof, Et Adjurnatur. 2 Cr. 28. Post. 563

Memorandum, That the eighteenth of November 1630. in this Term, *John Walter* Knight, the chief Baron died at *Serjeants Inn*, being a profound learned man, and of great integrity and courage, who being Lord Chief Baron by Patent *primo Caroli*, *quamdiu se bene gesserit*, being in the Kings displeasure, and commanded, That he should forbear the exercising of his Judicial place in Court, never exercised his place in Court, from the beginning of Michaelmas Term *quinto Caroli* until this day; And because he had that Office *quamdiu se bene gesserit*, he would not leave his place, nor surrender his Patent, without a *Scire facias*, to shew what cause there was to determine his Patent, or to forfeit it; so that he continued chief Baron until the day of his death. But it appears, That the Judges of both Benches are made only *durante bene placito Regis*, so as they are determinable at the Kings pleasure. 7. R. 101.

Aquila Weeks Case.

AQuila Weeks, Keeper of the Gatehouse, was sued in an Action upon the Case, for suffering J. S. to escape, who was in execution upon a Judgment, Trin. 2. Car. He pleaded Non culp. in London, and it was found by Nisi prius; And because the Record of the Nisi prius mentions the Judgment to be Trin. 3. Caroli, 8.

which was a misprision of the Record, the Plaintiff was non-suited: And now it was moved by Germin for the Plaintiff, That by reason of this misprision, the Record of the Nisi prius is not warranted by the Roll, and the Non-suit thereupon being Null, the Postea shall not be recorded nor entred; For there is no warrant for this Record of Nisi prius; Wherefore it was prayed, That a Distringas de novo might be awarded, and upon the shewing of two presidents in this Court, a Distringas de novo was awarded.

Crowle *versus* Dawson.

9. Post. 220. DEbt. Upon an Obligation conditioned, That whereas the Defendant should marry such a Widow, who was possest of divers goods which were her first Husbands and the goods of his Children, that her husband should not meddle with them, but that she and her Children might enjoy them without disturbance, claim, or interruption of the Defendant, or any claiming by him: The Defendant pleads performance of the Covenants and Agreements generally, The Plaintiff assigns for breach, that the said first Husband was possessed of such sheep and goods, And that the Wife had them before Marriage, And that such a day after the Marriage, the Defendant, her now Husband, took the said goods into his hands, and them detained, and yet detains: And Issue thereupon and found for the Plaintiff; And moved in arrest of Judgment, That this is no sufficient breach; for he doth not shew, that the Husband made any act or disturbance; for by the Intermarriage, the goods are in the Husband; and it is not shewn, that he disturbed the Wife to enjoy them; and of that opinion were Hide and Jones, But Justice Whitlock and my self conceived otherwise, And that the breach is well assigned; for by the Allegation, that he took the said goods into his hands and detained them, is supposed, if not a forcible, yet at least a taking and detaining of them from the Wife. And Issue being joyned and found for the Plaintiff, the Court intends not but that it was an unjust *caption & detention* contrary to the Agreement; and afterward Hide, mutata opinione upon the reading of the Books, was of the same opinion; Whereupon, absente Jones, it was adjudged for the Plaintiff.

King *versus* Lorde, Hill. 5 Car. rot. 795.

10. Jones 229. 2 Rol. 462. 1 Rol. 504. EJectione firmæ of a Lease of the Lady Pagetts. Upon a special Verdict the Case was. Lettice Knowls Copyholder for life, surrenders in consideration of twenty pounds to the use of one Dorothy Whystler; the Lord accepts the surrender, and grants it to Dorothy Whystler for her life, who was admitted accordingly, and dies: Lettice Knowls being alive, claiming it as her former Estate, lets it to the Defendant, and the Lord enters; and lets to the Plaintiff:

Plaintiff: And upon this Verdict, Whistler for the Defendant argued, That when a Copyholder for life surrenders to the use of another, who is admitted, the first Copyholder hath quasi a possibility or Remainder of an Estate, That if he survive him, to whose use the surrender is made, that he shall have it again. But he agreed, that if a Copyholder for life surrender his Estate to the intent, that the Lord should grant it to whomsoever he pleased, then his Estate was drowned, but not here; And for that he relied upon the Book, 9 Eliz. Dyer 264. But all the Court conceived he may not have it again, but that her Estate is meerly determined by the surrender, and that there is no difference as to that purpose, to surrender all her Estate to the use of one, and to surrender generally; and the Book of 9 Eliz. Dyer 264. doth not warrant such a difference. For if a Tenant for life surrender to the use of another, and the Lord grants it, he is meerly in by the Lord, and not by the Copyholder who surrendred: But if a Copyholder in fee surrender to the use of another for life who is admitted, he is in quasi by the Copyholder, and by his death the Copyholder shall have it again, but not here; whereupon it was adjudged for the Plaintiff. 1 Rol. 504. Co. lib. 429. b.

Note, This Judgment was impeached by a Writ of Error, and the matter in Law assigned for Error, And by all the Justices of the Common Bench and Barons of the Exchequer, the Judgment was affirmed.

The Lord Savills Case.

SIR Thomas Savill..... was sued in the Common Bench in Trespass of Assault, Battery, and Wounding, and found for the Plaintiff, and damages assessed to three thousand pounds; and Judgment being there for the Plaintiff, Error was brought and assigned: But upon examination of the Record, there was no material Error; whereupon Judgment was affirmed by the Rule of the Court: But before entry of the Judgment Sir Thomas Savill procured a Writ out of the Chancery, directed to the Justices of the Kings Bench, & quibuscunque interessed, wherein he shews to the Court, That Sir John Savill his Father was created Baron for his life, and after the Barony was limited to the said Sir Thomas Savill, being his youngest Son, and to the Heirs Males of his body; and the Writ recites, That he is a Peer of the Parliament, and therefore the Writ commands, that no other Process shall be awarded against him, but what shall be awarded against a Peer of the Realm. Now Banks moved, That this Writ should be recorded, and offered a Plea comprising such matter, that after the last continuance, and before this Term, Sir John Savill, the Father of Sir Thomas Savill, was created Baron for his life, and that after his death the said Sir Thomas Savill, who was his younger Son, should be a Baron; And the Plea shews, That Sir Thomas Savill Lord Savill 11. Jones 239.

died

died in September last, which was before Octabis Michaelis, And that the said Sir Thomas Savill mentioned in the Patent, and the said Sir Thomas Savill mentioned in the Record, est una & eadem persona, and concludes his Plea, and prayes, That no Process of Execution might be awarded against him, but what ought to be against a Peer of the Realm; And the Writ was read in Court, being the same which is in the Register, fol. 287. and Nat. Brev. 247. C. which is where one is sued in the Common Bench in a personal Action, and Process of Outlawry, A writ is sent out of the Chancery, reciting, That he is a Peer of the Realm, and appoints, that no other Process shall be awarded against him, than such as shall be against a Peer; and thereupon the Court appointed the writ to be recorded; but for the Plea, because there never was such a president, and that he is not Defendant in the Action, as it is in the said Case in the Register: For he is Plaintiff in the writ of Error, and hath no day to plead. The Plea was rejected, and the Judgment being affirmed, they would advise what Execution should be.

Termino

Termino Hillarij, anno sexto *Caroli* Regis, in Banco Regis.

Drake *versus* Munday.

DEbt by the Plaintiff as Executor to one Drake. Upon Demurrer the Case was. By Articles indented betwixt the Testator and the Defendant, It was covenanted, granted, and agreed, and the Testator covenants, grants, and agrees with the Defendant, That he shall have and enjoy such an House and Lands for six years; And that the Testator will sufficiently repair the House *Et in consideratione præmissorum*, it is covenanted, granted, and agreed betwixt the said parties; and the Defendant covenants, grants, and agrees for him, his Heirs, Executors, and Assigns, to pay to the Testator, his Heirs, Executors, and Assigns an annual rent of ninety pounds, during the said six years, at the Feast of *Annunciation* and Saint *Michael*; And upon this the Defendant entred, and the Testator died; and for ninety pounds arrear for one year after his death, the Executor brings the Action, and declares upon all this matter; and thereupon the Defendant demurs, And now Henden Serjeant for the Plaintiff argued, That this is meerly in Covenant, and shall not inure as a Rent by way of Reservation; and if it be a Covenant, it is due to the Executor; and if it be a Reservation, it follows the Reversion, and goes to the Heir, and not to the Executor; And he moved, that so it appears to be the intent of the parties, that it should be only as a Covenant, and as a sum in gross, otherwise the words of the Covenant were idle; And he relied upon the 10 Eliz. Dyer 272. 5. b. And the rather it is a Covenant; for that ratione præmissorum he covenants, which refers to more than the Covenant, to enjoy the Lands, &c. But all the Court conceived, that it is meerly a Rent, and ensues the Reversion, and shall go to the Heir: For as the words of the Covenant and Grant, that he shall enjoy the Land for six years, amounts to a Lease, and shall bind the Heir; so the words of the Covenant and Grant of the Lessee, that he shall pay such a Rent annually, amounts to a Reservation, and the rather, because he covenants and grants to pay to him and his Heirs. Vide Plowd. Browning and Beestons Case, 21 Hen. 7. 36. 1 Ed. 6. Leases, Broo. whereupon rule was given, That Judgment should be entred for the Defendant, Et quod querens nihil capiat per billam, unless cause were shewn

1. Jones 231.

2 Cr. 34.

Hob. 35. 1 Rol. 847. Moor 861. 2 Cr. 92. 2 Cr. 172. 2 Cr. 439, 500

ſhewn to the contrary, and afterwards being moved again, it was adjudged accordingly.

Beamond *verſus* Long.

2. UPon demurrer the Caſe was. *Baron* and *Feme*, the *Feme* being Adminiſtratrix to her former Husband, brings Debt upon a Bond of two hundred pounds due to the Inteſtate, and had Judgment to recover the Debt, their Damages, and Coſts, afterwards the *Feme* dies, and a year and a day being paſſed, the *Baron* brings a Scire facias to have execution; whereupon it was demurred; and all the Court (beſides Hide chief Juſtice who doubted thereof) Poſt. 464. conceived, That this Scire facias lies not for the *Baron*, because being a Debt demanded by the *Feme* as Adminiſtratrix, it is in *auter droit*; and although they recover, yet ſhe dying before Execution, the duty remains to him who takes new adminiſtration as in right of the Inteſtate; and although the *Baron* is party to the Judgment, yet he hath no property in the Debt; and he who ought to have the Scire facias, muſt have privity and property to have the Debt, otherwiſe it is a vain Suit: But if *Baron* and *Feme* bring an Action of Debt for Debt due to the *Feme*, and recover, the *Feme* dies, the *Ba-* Peſt. 227. *ron* may bring a Scire facias to execute this Judgment; for the Debt being recovered, the *Baron* after the death of the *Feme* ſhall have it, but not in the principal Caſe. Reſiduum poſtea page 227, 458.

Stroud *verſus* Hoskins.

3. PRohibition. Upon the Statute of ſecundo Edvardi ſexti, Be-
Jones 231. cauſe he ſues for tythes of heath and barren ground within ſeven years after the improvement: The Defendant pleads the Statute of quinquageſimo Edvardi tertij, capite quarto, and that at another time a Prohibition was granted, and conſultation thereupon, therefore he ſhall not now have another Prohibition. It was ſhewn that the conſultation was not upon the ſubſtance of the Prohibition, but becauſe he did not prove by two Witneſſes the ſuggeſtion within the ſix months, And it was thereupon demurred. The firſt queſtion was, Whether by the Statute the Suggeſtion ought to be proved by Witneſſes? And it was reſolved, That it ought, becauſe it is a meer matter in fact, and the ſuggeſtion ought to be proved by the intention of the Statute, as well as a preſcription de modo decimandi, or a diſcharge of tythes, or any other ſuch ſuggeſtion. R. 531. Yelv. 102. Secondly, It was reſolved, That the conſultation being granted for not proving the ſuggeſtion by two Witneſſes, according to the Statute of ſecundo Edvardi ſexti, and not upon the ſubſtance of the ſuggeſtion for want of its verity, or for the inſufficiency thereof, it is not within the Statute of quinquageſimo Edvardi tertij, capite 3 Cr. 736. quarto: For that is intended where conſultation is granted upon the ſubſtance of the ſuggeſtion, being proved to be inſufficient in verdict

Verdict or nonsuit after Evidence, and not where it is granted for the insufficiency of the form of the suggestion, or in the proceeding thereupon; Wherefore it was adjudged for the Plaintiff; Especially as this Case is, for that it is a collateral cause out of the suggestion, and no cause of consultation at the time of the Statute made.

Sir William Courtney *versus* Sir Richard Greenville Knight.

4.

ERror to reverse a Judgment in the Common-Bench in debt; Where the Plaintiff declared, That the Defendant decimo octavo Maii, quarto Caroli, concessit se teneri to the said Sir Richard Greenvill in 280. l. solvend. upon request, Et profert hic in Curia scriptum prædictum quod debitum prædictum in forma prædicta testatur, cujus dat. est eisdem die & anno: The Defendant demands *Oyer* conditionis scripti obligatorii prædicti; which being read, he pleads payment; And Issue thereupon, and Judgment given for the Plaintiff; And the error assigned, because he doth not declare according to the usual course, quod per scriptum obligatorium concessit, nor any Writing mentioned in the former part of the Declaration: So it doth not appear to the Court, that there was any Writing obligatory, and that being faulty in substance, no Plea or Verdict may make it good. But all the Court were of opinion, because he shewed the Writing, whereby he demands the Debt, and the Defendant by his Plea shews, that it is an Obligation with a Condition, and Issue is taken thereupon, and found for the Plaintiff, that the Declaration is good enough, at least it appears to the Court, that the Plaintiff hath a just Debt, and good cause to recover; wherefore the Judgment is good and was affirmed. Co. Rep. 45. 7. Rep. 25. a. 8. Rep. 133. b. 8 Hen. 7. 71. 18. Ed. 4.

Post. 363.

Post. 288. Co. Litt. 303. b.

Gray *versus* Fielder.

5.

DEbt. Upon an Obligation assigned by the Commissioners of Bankrupts, and doth not shew the Obligation; wherefore it was demurred. And because he comes in by Act in Law, and hath no means to obtain the Obligation, it was adjudged to be good enough, without shewing it in Court; as Tenant by Statute Merchant, or Tenant in Dower, shall have advantage of a Rent charge without shewing the Deed.

2 Cr. 109. 317. Co. 5. 75. a. Lib. 10. 94. b. Post. 442.

Sir Miles Hobert and William Stroud Esq; their Case.

6.

THe Attorny-General exhibited two several Informations, the one against William Stroud Esq; the other against Sir Miles Hobert Knight: The charge against both of them therein was for several escapes out of the Prison of the Gatehouse, They

Post. 251.

both pleaded Not guilty, and their Cases appeared to be as follow-eth. The said William Stroud and Sir Miles Hobert were by the Kings command committed to Prison, for misdemeanor alledged
Ante. 182. against them in their carriage, in the House of Commons at the last Parliament: Afterwards in Trinity Term anno sexto Caroli, both of them being by Order of this Court, and by a Warrant from the Attorney-General to be removed unto the Gatehouse: The Warden of the Marshalsey (where they were before imprisoned) sent the said Stroud to the Keeper of the Gatehouse, who received him into his house, lately built, and adjoyning to the Prison of the Gatehouse, but being no part thereof. After which receipt the same night he licenced the said Stroud to go with his Keeper unto his Chamber in Greys-Inn, and there to reside. Sir Miles Hobert was also by the said Warden of the Marshalsey delivered to the Keeper of the Gatehouse; but being sick and abiding at his Chamber in Fleetstreet, he could not be removed to the Prison of the Gatehouse, but there continued with his Keeper also. Afterwards the Sickness increasing in London, they (with the licence of the Keeper of the Gatehouse, as it was proved) retired with their under Keepers to their several houses in the Country, for the space of six weeks, untill Michaelmas Term then next following, when, by direction of the said Keeper they returned to his house. But in all that space it could not be proved, That they ever were in any part of the old Prison of the Gatehouse, but in the new building thereto adjoyning, unless when they once withdrew themselves to a close-stool which was placed neer to the Parlour, and was part of the old Prison of the Gatehouse. This evidence was given to both the said Juries, and both of them returned their Verdicts severally, That they were not guilty according to the Informations exhibited against them: And in this case it was debated at the Barr and Bench, whether by this their receipt and continuance in the new house only, it may be said, That they ever had been imprisoned? And the Judges held, That their voluntary retirement to the close-stool made them to be Prisoners: They resolved, that in this
R. 150. and all other Cases, although a Prisoner departs from Prison with his Keepers licence, yet it is an offence as well punishable in the Prisoner as in the Keeper: And Calthrop made this difference betwixt breach of Prison and escape; the first is against the Gaolers will, the other is with his consent, but in both the Prisoner is punishable: whereunto the whole Court agreed. It was also resolved, That the Prison of the Kings Bench is not any local Pri-
Post. 466. son confined only to one place, and that every place where any person is restrained of his liberty, is a Prison: As if one take Sanctuary and depart thence, he shall be said to break Prison.

Termino

Termino Paſchæ, anno ſeptimo *Caroli* Regis, in Banco Regis.

Memorandum, That in this Term Sir *George Vernon*, one of the Barons of the Exchequer, was made *puiſny* Juſtice of the Common Bench, in place of Sir *Humphry Davenport*, who was made chief Baron of the Exchequer in *Hillary* Term laſt paſt, and *James Weſton* of the Inner-Temple was, by Writ returnable *Menſe Paſchæ*, made a Serjeant, He appearing in Chancery *quarto die poſt* of the return, being Thurſday; And the Monday following, before all the Juſtices of the Kings Bench and Common Bench, and Barons of the Exchequer (none being abſent) aſſembled at Serjeants Inn in *Fleet-ſtreet*, performed the ſolemnity, reciting his Count, And his robes were there put on; and he made his Feaſt in Serjeants Inn for the Juſtices and Serjeants and the Kings learned Councel, and gave Rings, according to the uſual manner, afterward, with this inſcription, *Servus Regi, ſerviens Legi*; And within two dayes, was made one of the Barons of the Exchequer. 1.

Flowrs Caſe.

Action upon the Caſe. Whereas ſhe was a Midwife, and had uſed that art for divers years, and by that means gained much maintenance for her ſelf and Family, That the Defendant, having communication of her and her profeſſion, ſpake theſe words of the Plaintiff, Many have periſhed for her want of skill: And after Verdict, being moved in arreſt of Judgment, that theſe words were not actionable, it was adjudged for the Plaintiff, For ſhe hath a profitable gain by that Function, and therefore thoſe words may be prejudicial. 2. R. 202.

Helier *verſus* Hundred de Benhurſt.
Paſc. 6. Car. rot. 233. Berks.

Action upon the Statute of *Winton*, For that he was robbed of ſeventy pounds, and made Hue and Cry, and amends was not made, nor any of the Robbers taken: And Counts upon the Statute of Winton, And that he took his oath before John Saunders Juſtice of the Peace within the ſaid County of Berks, and inha- 3. Jones 239. 1 Ro. 538.

biting within the Hundred, within twenty days before his Writ brought, that he was robbed, and did not know any of the parties, according to the Statute of viceſimo ſeptimo Elizabethæ. And upon Not guilty pleaded a ſpecial verdict was found as for the Plaintiff according to the Declaration. And further that he took his oath before the ſaid John Saunders, Juſtice of the Peace of the ſaid County and inhabiting in the ſaid Hundred at his Chamber in the middle Temple London. And ſo conclude, if upon all the matter the Court ſhould adjudge for the Plaintiff, they find for the Plaintiff; And if, &c. for the Defendant. And the main queſtion was, whether this examination and oath was taken ſecundum formam ſtatuti. And this matter being argued at the Bar, it was alledged by the Defendants Counſel, That a Juſtice of Peace hath only his Juriſdiction within the County where he is a Juſtice of the Peace, and may not elſewhere exercile his Juriſdiction: And this examination is as Juſtice of the Peace of the County where the ſame fact was done; And the Statute of viceſimo ſeptimo Elizabethæ appoints the oath and examination to be taken by Juſtices of the County, inhabiting in or neer the Hundred; And what he doth out of the County is coram non Judice; and for that purpoſe were cited, 13. Ed. 4. 9. & Plowd. Comment. Plats Caſe fol. 32. That a Juſtice of Peace cannot exercile his Juriſdiction out of his County, to commit any Felon. But Littleton and Grimſton for the Plaintiff moved, that this verdict finding, that he took the Examination according to the form of the Statute, and ſo a general verdict at the firſt; The finding after this ſpecial matter is not to purpoſe, 22. Eliz. Dyer, As the Caſe of Sir Rowland Heyward. Aſſumpſit. The Jury find a general verdict according to the Iſſue, and a ſpecial matter againſt it, the laſt is void. But the Court took not any regard to this reaſon: For the matter in Law being found, the Court ſhall adjudge according to it. Secondly, They moved for the matter, that the examination is well taken in London: For the Statute doth not appoint, that it ſhall be taken in the County; but by a Juſtice of the Peace of the County, inhabiting in or neer the Hundred, &c. and that within twenty dayes before the Writ brought, Becauſe he will by intendment be more careful in the examining, he being partaker of the burthen, if it ſhould be recovered againſt the Hundred; And he is to examine as well concerning the Robbery, as whether he knows any of the perſons who robbed him. And they ſaid, that of theſe matters, in whatſoever place he be, he may take cogniſance and examination; And that they had ſeen a Report octavo Jacobi, That a Juſtice of Peace taking a recogniſance out of the County, it was good enough: For which, &c. And it being moved again, all the Juſtices agreed, that he is ſaid to be a Juſtice of Peace inhabiting in the Hundred, where his wife, family, and himſelf are uſually commorant, although in the Term time he be at London, But Hide chief Juſtice, and Whitlock, conceived at firſt, That the examinations cannot be taken out of the County, Becauſe it is out

Ant 76.
2 Cr. 55.
3 Cr. 481.
Hob. 53.

Hob. 53.

of

of his Juriſdiction where he is Juſtice of Peace, for their Juriſdiction is private: But Juſtices of the Kings Bench may take ſuch examinations or exercile Juriſdiction in any place; for their authority is general; And compared it to the Caſe where two Juſtices of Peace (upon the Statute of decimo octavo Elizabethæ) ſet down an order for the keeping of a Baſtard, it cannot be done by them out of the County; alſo by the Statute of quinto Elizabethæ of Laborers, Orders of Juſtices of Peace, ought to be by them which are inhabitants in the County, and when they be in the County, and not to be made by them out of the ſame: And therefore becauſe it was taken out of the County, they held it was ill. But Jones and my ſelf conceived. That this examination and oath, although found to be taken in London, he being a Juſtice of Peace of the ſaid County, and inhabiting in the Hundred, is a perſon whom the Statute appoints and authoriſeth to take examinations; And that being taken by him, who by intendment will have ſtrict care to the examination (becauſe himſelf may be lyable to part of the charge) it is not material where it be taken. And it is not any Act of exerciſing Juriſdiction, But rather a direction That ſuch oath and examination ſhall be taken before ſuch a perſon. As if it were appointed, that ſuch an oath ſhall be taken before ſome Knight or Judge inhabiting within the Hundred, that is not any point of Juriſdiction, but a deſcription of the perſon before whom the examination ſhall be taken, and which may be as well taken in any other place as in the County: And therefore it was ſaid, that there is difference where a Juſtice of Peace doth an Act to compell another to perform, as to impriſon any for non performance; or to command one, for any offence, to be impriſoned; ſuch Acts cannot be done in any place but where his Juriſdiction extends: But it is an uſual courſe for Juſtices of Peace to take informations againſt offendors in any place out of the County, to prove offences in the County where they are committed: And ſome times they take Recogniſance to proſecute; and ſuch Recogniſances taken out of the County by voluntary aſſent of the parties bind well enough, and are uſual: But they cannot compell any out of the County to enter a Recogniſance; For they cannot uſe coercive power out of the County; Whereupon the Court would adviſe. And afterwards this Caſe being propounded at the Table in Serjeants Inn to the chief Baron, and to Baron Denham, Baron Trever, Baron Weſton, and to Juſtice Harvey; and I propounding it to Juſtice Hutton, they all, after advice, agreed, That this examination taken in London, by a Juſtice of Peace of the County, inhabiting in the Hundred, though at that time he were out of the County, was good enough; And Juſtice Whitlock afterwards agreed thereto, Becauſe it was not an Act of Juriſdiction, but only matter of examination, to enable the Plaintiff to his Action; Whereupon afterwards, by the aſſent of Hyde chief Juſtice, Judgment was given for the Plaintiff, 47. Aſſ. 11. Juſtices of Aſſiſe take verdicts in other Counties. 1 H. 6. 3.

Diſtreſs

Diſtreſs may be driven into another County, &c And 27. Eliz. in Com. Bench between Charren and Barnes, a Biſhop of Ireland, being in England, committed Adminiſtration of the goods of one who dyed Inteſtate within his Dioceſs in Ireland, and adjudged good.

Flower *verſus* Elgar.

4. Jones 238. 2 Ro. 402. 1 Rol. 307. 8.

AUdita Querela. Upon demurrer the Caſe was, One recovers in Debt, and takes Execution by Elegit, whereupon the Defendants Lands were extended, and after aſſigned over, and ſo conveyed from one to another into ſeveral hands; And afterwards the Plaintiff in the Action releaſed all ſuch Judgment and Executions; And now the Defendant brings an Audita Querela, and all this matter was ſhewn in the Writ, and thereupon it was demurred, Becauſe the Writ is brought againſt the firſt Plaintiff, who did recover, where he had diſmiſt himſelf of all the intereſt of the Extent, and it ought to have been broughtagainſt theAſſignee of the Extent. But notwithſtanding, the Court adjudged, that the Audita Querela was well brought; For he being party to the Judgment, his releaſe hath diſcharged the Judgment.

R. 742. 3.

Fawkener *verſus* Bellingham.

5. Het. 26. 36. Jones 233.

ERror to reverſe a Judgment in the Common Bench (quod vide ante pag. 80.) was argued divers times at the Barr; And now this term at the Bench, the Error aſſigned in point of Law. All the Juſtices, viz. Hide, Jones, Whitlock, and my ſelf, argued in one day, and delivered our opinions in order, that this Judgment is erronious, and ought to be reverſed; For we all conceived, It was the ſame rent as before, and not a new rent begun by the Statute, but changed by operation of Law from a Rent Service to a Rent Seck; Nor is it a new Rent given by the Statute, becauſe it doth not appoint any certainty of Rent, but referrs, that ſuch a Rent as the Lords thereof had before, they yet ſhall have, ſuch in quantity, ſuch in eſtate. And Jones ſaid, That if he had recovered this rent before the Statute in an aſſiſe, and after the Statute had been diſſeiſed again, he ſhould have had a reciſſeiſin, which ſhews that it is the ſame Rent. And Jones and Hide conceived, If Rent be given by the Statute, and no limitation of a diſtreſs therein, it is a Rent Seck, and there cannot be a diſtreſs for that Rent. But here it is agreed on every part, That to this Rent there belongs a diſtreſs, and the reaſon is, Becauſe a diſtreſs belonged to this Rent before; ſo being changed the diſtreſs belongs to it; And it is expreſly within the letter and intent of the Statute, that no Avowry ſhall be made for Rent unleſs there hath been ſeiſin thereof within forty years: And it doth not appear but that this Rent might be

be loſt for want of ſeiſin, before the Statute of primo Edvardi ſexti; and as the Statute of triceſimo ſecundo Henrici octavi barrs to claim it, unleſs he hath had ſeiſin within forty years; ſo the Statute of primo Edvardi ſexti doth not alter it, nor give more liberty thereto than it had before; And therefore if it ſhall be ſaid to be Rent created by the Statute, it ought to appear by the Statute what the Rent is in ſpecial which is created by the Statute, but that doth not appear, and therefore it is the ſame Rent which was before, of which the beginning is not known, whereof ſeiſin ought to have been within forty years; and thereupon Jones put this caſe. Lord and Tenant by Rents and Services; If the Tenant by licence at this day makes a Feoffment by Indenture, to hold of him by the ſame Services as he holds over, In Avowry for this Rent, there ought to be ſeiſin within forty years: For it is not a Rent of certainty newly created, but referrs to the ancient Tenure, which ought to be ſhewn and ſeiſin proved; but if he create a Rent certain, it is otherwiſe. And there is difference, as all the Juſtices held, where the ſaving is of all the Rents; for that nihil certi implicat, and where it is a ſaving of a particular Rent to certain perſons; and it would be a great miſchief if there ſhould be ſuch an expoſition, That Rents generally ſaved by the Statutes, ſhould be out of the Statute of Limitation; wherefore they all concluded upon the point in Law, That this Plea, that he was not ſeiſed within forty years, &c. was good, and the Judgment given for the Defendant erronious. But Whitlock and Hide conceived, that the Avowry is ill, becauſe it is ſaid, That ultimus Presbyter was ſeiſed of the Land holden jure Presbyteratus, whereas none can be ſeiſed in jure *del* Prieſthood, which is his Office, but in jure Cantariæ only. And to that point the other Juſtices ſpake not; but upon the point in Law, they all agreed, That the Judgment ſhould be reverſed. Ante 84.

Termino

Termino Trinitatis, anno ſeptimo *Caroli* Regis, in Banco Regis.

Ward *verſus* Uncorn.

DEbt for ſeventy two pounds, Whereas the Plaintiff and De-
1. fendant 29. Decemb. 6. Caroli, ſubmitted to an Award of all
1 Ro. 244. 5. Actions, Suits and Demands betwixt them, to be Arbitra-
ted by J. S. and J. D. So that they made their award by Indenture
before the fifth of January next following. And ſhews, that they,
upon the fifth of January, by Indenture, made their Award upon the
Premiſes, and thereby Awarded ſeventy two pounds to be payed by
the Defendant to the Plaintiff, and that either of them before the
twelfth of January following ſhould make a Releaſe, from one to
another, of all Actions, Suits and Demands, before the twenty
eighth day of December laſt paſt. That for not paying this ſeventy
two pounds the Plaintiff brings this Action. The Defendant pleads
nil Debet, and found for the Plaintiff. And Germin moved in arreſt
of Judgment, that this Arbitriment is void, becauſe they did not
determine all Controverſies to the time of the Submiſſion: For
they appoint a Releaſe to be made of all Actions and Demands
untill the twenty eighth of December: So the twenty eighth of
December is one day before, and there might divers cauſes of
Action ariſe after the twenty eighth of December; And the Arbitri-
ment made the fifth of January recites, That Actions and Con-
troverſies were then depending, wherefore this Arbitriment was
void, and the Plaintiff ought not to have Judgment. But
Whitfield è contra. For they recite in their Award that they
made their Arbitriment de & ſuper præmiſſis. So it ſhall not be in-
3 Cr. 858. tended that any new cauſe of Action aroſe upon the ſaid twenty
eighth of December, unleſs it be ſpecially ſhewn. And when they
ſay they made an Award de & ſuper Præmiſſis, it ſhall be intended
that they made an end of all things ſubmitted unto them, (and
which were notified unto them) unleſs the contrary be ſpecially
ſhewn. And this Releaſe ſhall diſcharge all matters, although
they were depending in ſuit the twenty ninth of December, being
the day of Submiſſion, they ariſing for cauſes before; And for that
he relyed upon Baſpoles Caſe. Cok. 8. fol. 97. and cited a Caſe
3 Cr. 858. Trin. 43. Eliz. rot. 947. betwixt Barnes and Greenway, where a ſub-
miſſion made the fourth of December, of all matters and contro-
verſies betwixt them, and the Award was of forty pounds to be paid
in ſatisfaction of all cauſes and matters untill the third of De-
cember,

cember, and ſo excludes one day before the ſubmiſſion, and for this cauſe exception taken and yet adjudged good; For it ſhall be intended a final determination of all cauſes, and there ſhall not be ſuppoſed that any cauſe did newly ariſe the third day of December, unleſs it be ſpecially ſhewn; ſo here, &c. for which, &c. And of this opinion was all the Court; for when he ſaith they made an Award de & ſuper præmiſſis; and it doth not appear to the Court by any ſpecial ſhewing, That there is any cauſe newly ariſen upon the ſaid twenty eighth of December, the Court will not conceive any; therefore the Award is well made, eſpecially when he takes Iſſue, that nullum tale fecerunt arbitrium, or Nil debet, which is all one as this caſe is; whereupon a Rule was given, that Judgment ſhould be entred for the Plaintiff, unleſs cauſe ſhewn, &c. 2 Cr. 353. 3 Cr. 353. 2 Cr. 578. Hob. 190.

Flower *verſus* Baldwin. Hill. 4 Car. rot. 687.

TReſpaſs. Upon a ſpecial Verdict the Caſe was, One bargains and ſells by Indenture octavo Julij viceſimo Jacobi; The Deed is acknowledged the tenth of July before a Maſter in Chancery; The ninth of October following the Bargainor ſuffers a Judgment in the Common Bench; The eighteenth of October the Indenture is inrolled in Chancery: Iſſue was joyned, Whether the Bargainor was ſeized in fee at the time of this Judgment? And all this matter being found by ſpecial Verdict, Littleton for the Plaintiff argued, That the Indenture being inrolled, ſhall have relation to the time of the ſealing and delivery thereof, and makes the Bargainee ſeiſed ab initio, and then the Bargainor was not ſeiſed at the time of the Judgment; and for that he relyed upon 8 Ed. 6. Bro. *Inrollment de fayts* 9. where two Jointenants the one bargains, &c. the other dies before Inrollment, and the Inrollment is within the ſix months, the moity only ſhall paſs, for the Deed intended to paſs but the moity: And Cok. Litt. 147. b. if after the bargain and ſale: the Bargainor and Bargainee joyn in a Grant of a Rent-charge, the Deed is inrolled within ſix months, it is the Grant of the Bargainee, and confirmation of the Bargainor; And if bargain and ſale be of a Manor; and an Advowſon appendant, and the Church becomes void before the Inrollment, the Inrollment being within the ſix Months, the Bargainee ſhall have the benefit of this preſentation, and of all arrears of Rents incurred before the Inrollment, it being within the ſix months. So if a Bargainee hath a wife and dies, afterward the Deed is inrolled, The wife ſhall have Dower, as it was reſolved for the wife of Baron Frevill; and that, Trin. 14. Jacobi betwixt Gawen and Stacy, it was adjudged, That if the Bargainee grants a Rent out of the Land before Inrollment, and afterwards it is Inrolled, the Grant is good; wherefore, &c. But Charles Jones argued for the Defendant, That until Inrollment the poſſeſſion and freehold continues in the Bargainor, and nothing 2. 2 Inſt. 674. Co. Litt. 186. a. Poſt. 569. 2 Cr. 53. Poſt. 569.

Poſt. 284. veſts out of him; for the Statute is expreſs, That nothing ſhall paſs until Inrollment; ſo that until the Inrollment he remained ſeiſed; then the Inrollment not being until the eighteenth of October, and the Judgment being the ninth of October, and the Iſſue being, Whether he were ſeiſed in fee the ninth of October? Upon this ſpecial Verdict the Iſſue is found for the Defendant; which is the reaſon, in Co. 4. 71. a. Hinds Caſe, That if a Bargainor makes a Feoffment, or levieth a Fine before the Inrollment to the Bargainee himſelf, and afterwards the Deed is inrolled, the Bargainee is in by the Fine or Feoffment; but the Inrollment ſhall take away all Incumbrances made by the Bargainor himſelf to a Stranger, that they ſhall not prejudice the Bargainee; for the Inrollment hath relation to take away all Incumbrances. For which, &c. And all the Court agreed, That the Inrollment of the Deed within the ſix months relates to the ſealing of the Deed, and makes the Bargainee in, to avoid all Incumbrances made unto Strangers after the inſealing. But Jones Juſtice conceived, That Hob. 165. in rei veritate the Bargainor ſhall be ſaid to be ſeiſed always until the Inrollment, and nothing paſſed to the Bargainee until the Inrollment; 2 Inſt. 674. for it is ſo expreſly appointed by the Statute; and it is quaſi conditio præcedens, and untill it be performed nothing veſts in the Bargainee. And he cited a Caſe betwix Bellingham Bargainor, 1 Vent. 361. and Alſop Bargainee ſecundo Jacobi, That if a Bargainee before Inrollment bargains the Land to any other, and after the Ante 130. firſt Deed is inrolled, and afterwards the ſecond bargain and ſale, 2 Cr. 52, 53. and both of them within the ſix months: The ſecond Bargain and ſale is void, becauſe there was nothing in him at the time of the bargain and ſale; and therefore he and Hide chief Juſtice inclined (as this Caſe was, and the Iſſue joyned and found) for the Defendant. But I was of opinion, That when the Inrollment is within the ſix months, he is in ab initio, and the Fee veſts in the Bargainee ab initio; for the Statute of viceſimo ſeptimo Henrici octavi executes the poſſeſſion to the uſe; but that is ſtopped until the Deed be inrolled within the ſix months, and when the Deed is inrolled, it veſts in him ab initio, and the poſſeſſon is expectant to the uſe at the time of the ſealing of the Deed; and until the Deed inrolled, the Bargainee hath election, whether he will take it by the Deed, or not, which is the reaſon, that if he himſelf in the interim takes an Eſtate by Feoffment or Fine, he himſelf deſtroys the uſe, and takes by conveyance at the Common Law and not by the uſe: But when he himſelf doth no act of diſturbance, and the Inrollment is within the ſix months, it ſhall relate to the date of the Deed; and that is the reaſon he ſhall have all Rents incurred in the mean time, and the benefit of preſenting to Churches when they fall, and ſhall be ſaid ſeiſed ab initio; And then the Bargainee is ſeiſed the ſaid ninth day of October, being the day of the Judgment, and not the Bargainor, &c. whereupon the Court would further adviſe.

Arkey

Atkey *verſus* Heard.

ACtion *ſur Trover & Converſion* of Goods of the Inteſtates. The time of the converſion being ſuppoſed after the Adminiſtration committed, Verdict being found againſt the Plaintiff, the Queſtion was, Whether the Plaintiff ſhould pay coſts? and reſolved, That this Action being grounded upon the Converſion in his own time, and not in the time of the Inteſtate, was as his own proper Action; wherefore he ſhould pay coſts. 3. Jones 241. 1 Vent. 92. 109. R. 473. Ante 29.

Taylor *verſus* Willes. Trin. 5 Car. rot. 1204.

ERror *ſur* Judgment in Exceſter. In an Action of the Caſe upon an Aſſumpſit, That in conſideration the Plaintiff Willes would deliver two hundred and a quarter of Woad, the Defendant Taylor aſſumes to pay as much as it ſhould be reaſonably worth; and upon another conſideration aſſumed to do another Act; Taylor pleaded Non aſſumpſit; the Jury find quod Aſſumpſit, and aſſeſs for damages thirty three pounds ſix ſhillings eight pence (to be paid in dying, if by Law it may be) and aſſeſs for coſts ſix ſhillings eight pence; and Judgment was given, That he ſhould recover the thirty three pounds ſix ſhillings eight pence for damages aſſeſt by the Jury, and the coſts; and Error being brought, Germin for the Plaintiff in the Writ of Error aſſigned for Error, Firſt, That the Verdict is ill, Becauſe they find generally quod aſſumpſit, and do not divide them being ſeveral, ſed non allocatur; for if they were upon ſeveral promiſes, yet Non aſſumpſit generally is good; And the Verdict ſo general is good. The ſecond Error was, Becauſe it was found, that the damages of thirty three pounds ſix ſhillings eight pence to be paid in Dying, if by Law it may be, is void, &c. ſed non allocatur; for the finding the Aſſumpſit is good enough, and ſo was the aſſeſſing damages to thirty three pounds ſix ſhillings eight pence, but that which is found after is void, and the Judgement (omitting that which was void) is good enough; wherefore the Judgment was affirmed. 4. 2 Rol. 695. 2 Cr. 681. 2 Cr. 544.

Mariot *verſus* Kinſman, Mich. 5 Car. rot. 38.

DEbt. Upon an Obligation, The Defendant demands Oyer of the Condition, which was, Whereas he had taken A.S. a widow to wife, being poſſeſſed of divers Goods, If he ſhould permit his ſaid wife to make a will, and to diſpoſe in Legacies as much as ſhe would, not exceeding fifty pounds, and pay and perform what ſhe appointed, ſo that it did not exceed fifty pounds, That then, &c. The Defendant pleads, that ſhe did not make any will. The Plaintiff takes Iſſue thereupon, and 'twas found, That ſhe 5.

made a Will, and thereby disposed of divers Legacies, not exceeding the sum of fifty pounds; But that she was *Covert* at the time of the Will making, &c. and it was adjudged for the Plaintiff: For although she being a *Feme Covert*, could not in Law be permitted to make a Will to dispose of any Goods without the Husbands assent, yet it is a Will within the intent of the Condition; For it was the intent of the Condition, that she should make a Will to that purpose, notwithstanding the *Coverture*; And it is but her appointment, which the husband by his Obligation is bound to perform: For which the finding that she was a *Feme Covert* is not material: Whereupon a Rule was given, That Judgment should be for the Plaintiff, unless other matter was shewn, &c.

3 Cr. 27.
Ante 204.
Post. 376, 597.
1 Mod. 211.

Drakes Case.

6. PRohibition. To stay a suit in the Spiritual Court before the Commissioners Ecclesiastical for Alimony: Where the Libel supposeth divers particular cruelties used upon the wife, for which she was enforced to depart; and that the husband would not allow her any maintenance, and therefore she sued before the Ecclesiastical Commissioners for maintenance. And because it is a Suit properly suable before the Ordinary, wherein if there be any wrong, the party grieved may have an Appeal; And although this is one of the Articles, whereby authority is given them by the Commission to hear and determine; yet because it is not any of the causes which are within the Statute of primo Elizabethæ, for which causes the Commission is ordained, the Court awarded a Prohibition ex motione *Laurentij Hide* Militis.

2 Cr. 364.
Ante 114.

Rockey *versus* Huggens, Trin. 4 Car. rot. 764.

7. EJectione firmæ. Upon a special Verdict the Case was, A Copyholder for life pretending a custome in a Manor, That he may cut down and sell Elms growing upon his Copyhold; And the Lord pretending, That there was no such custome; or if there were, that it was void and against Law, enters for a forfeiture, and makes the Lease to the Plaintiff: The Copyholder re-enters: and upon Not guilty pleaded; the Jury found, That the Land was Copyhold for life, and that he cut down Elms, being timber trees, and sold them, and found the custome of the Manor as the Copyholder pretends; And whether it were a good custome or not, was the question? And it was oftentimes argued at the Bar by Germin and Brampston Serjeants for the Plaintiff, and by Rolls and Charles Jones for the Defendant. And now this Term all the Court resolved for the Plaintiff; For this custome found, is a void and unreasonable custome, and not allowable by Law, That a Copyholder for life may cut down and sell timber trees, and dispose of them at his pleasure, For it is in destruction of the Inheritance

Jones 245.
1 Rol. 560.

and

and against the nature of a Copyholder for life. But peradventure there may be such custome for a Copyholder of Inheritance, that being only to the prejudice of him and his heirs; And when he hath quasi an Inheritance in the Copyhold, he hath so likewise in the trees growing thereupon. But a Copyholder for life hath but a particular estate in the Land, and so he hath in the trees; And it is unreasonable, that he should cut down, sell and destroy the Inheritance, and it would be to the great prejudice of those who succeeded, for they should not have to maintain the House and the Plough. And although it was urged at the Bar, That it being found to be the custome, the Court shall not adjudge it ill and unreasonable, when it may have reasonable beginning: For as Lease for life may be without impeachment of Waste, so it may be here, That the Lord granted it at the beginning with this liberty, and the Lord by that means might have the greater Fine upon the granting of the Copyhold; And this Copyhold being by intendment always in the hands of particular Tenants, it may be supposed that they planted and nourisht them, and therefore should have the greater liberty to cut down and dispose of them. But the Court held, That these reasons will not maintain this custome; For Lease for life or years, without impeachment of Waste ought to be begun by Deed and without Deed is not good. And it is against the nature of the Estate of a Copyholder, that he should do Acts in destruction of his Estate; therefore customes which maintain them shall be allowable, but not è converso. And a President was shewn to the Court; Hill. 45 Eliz. rot. 156. in the Com. Bench betwixt Powell and Peacock, where such a custome was pleaded in Trespass, and adjudged, It was not good. And I my self have seen the report of a Case, Hill. 6 Jac. rot. 2613. betwixt Rowles and Masters, upon a special Verdict in an Ejectione firmæ, which was adjudged Trin. 10 Jac. where the custome of Beaumister was that a Copyholder for life might nominate his Successor, and so in perpetuum &c. That such a Copyholder might cut down and sell timber trees; All the Justices argued, That where such a Copyholder hath the Inheritance, and where his Successor comes in by his nomination (whom by intendment he would not prejudice) there such a custome might be good. But they all agreed, such a custome for a Copyholder for life to cut down and sell trees, was not good; and they there cited the case of Powell and Peacock to be so adjudged, and to be good Law. And so all the Court here held, That this custome found is void and unreasonable; Whereupon it was adjudged for the Plaintiff. Vide 14 Ed. 3. Barr. 77. 21 Hen. 7. 40. 11 Hen. 7. 14. 9 Hen. 4. Wast. 59.

2 Cr. 30. 1 Rol. 560. Jonet 245. 1 Rol. 560. 1 Brownl. 122. 2 Brownl. 85, 192.

Congham *versus* King. Hill. 6 Car. rot. 114.

COvenant. Against the Defendant as Assignee of an Assignée, for not repairing of an house let inter alia. The Defendant takes

8. Jones 245. 1 Roll. 522.

takes Iſſue upon the mean aſſignment of the Leaſe laid in the Declaration. After Verdict for the Plaintiff, Wright took divers exceptions to the Declaration in arreſt of Judgment, That the Plaintiff ſhews the Leaſe to be to J. S. and by him deviſed to J. D. and made J. N. his Executor, and that he virtute legationis entred and aſſigned to W. S. and he entred and aſſigned one houſe, parcell of the præmiſes, to the Defendant, who entred and made ſpoil in an Hall and Chamber, parcel of the demiſed præmiſes, &c. One Exception was, Becauſe he ſhews that the Deviſee entred and was poſſeſſed virtute Legationis, and doth not ſay, That the Executor aſſented, ſed non allocatur: For being alledged, That he thereof was poſſeſſed virtute Legationis, and Iſſue being taken upon a collateral matter, it ſhall be intended that he entred with the aſſent of the Executor. Another exception was, Becauſe the breach was aſſigned in ſuch an houſe parcel præmiſſorum, and doth not ſay præmiſſorum prædimiſſorum, and to him aſſigned; for in the Leaſe are divers things excepted, and it may be that this is parcel of the things excepted, or not parcel of the præmiſes aſ-
Co. 11. 51. a. ſigned, ſed non allocatur: For præmiſſa ſhall be intended prædimiſſa & aſſignata, and ſhall not be extended to any Lands not dimiſſa. The next exception alledged was, That the Defendant is but Aſſignee of parcel of the things demiſed; and then he is not chargeable with this Covenant, no more than the Aſſignée of parcel ſhall be charged in debt for the Rent; But the Action lies againſt the firſt Leſſee, as it is held Cok. lib. 3. 23. Walkers Caſe; ſed non alloca-
1 Rol. 522. Co 5. 16. b. tur: For this Covenant is dividable and follows the Land, with which the Defendant, as Aſſignee, is chargeable by the Common Law, or by the Statute of triceſimo ſecundo Henrici octavi; whereupon it was adjudged for the Plaintiff.

9. A *Feme Covert* ſues in the ſpiritual Court (without her huſband, as ſhe may) for defamation, and ſentence for her, and coſts aſſeſſed. In appeal of this Sentence to the Arches, the Defendant pleads there the releaſe of the *Baron* as well for the Sentence as for the Coſts, which was there diſallowed; whereupon he prayed a Prohibition: For it was alledged, that as a *Feme* may ſue, ſo the *Baron* may releaſe, and that being releaſed is to be guided according to the common Law. But the Court conceived, That the releaſe of the *Baron* cannot be a bar to this ſuit quoad reformationem morum: For the *Feme* being ſcandalized, may ſue in the Spiritual Court to be repaired therein; and the Court may ſentence the Defendant to a ſubmiſſion or corporal ſatisfaction, which the *Baron* cannot releaſe. But for the releaſe of the coſts, the *Baron* may well do it; whereupon Rule was given, If cauſe were not ſhewn at a day, &c. that a Prohibition ſhould be awarded to ſtay the ſuit quoad the coſts.

Sir

Sir William Maſham *verſus* Bridges.

ACtion of the Caſe for words. Whereas he was a Juſtice of Peace of the County of Eſſex by virtue of the Kings Commiſſion for the ſpace of ten years, That the Defendant the firſt of January, ſexto Caroli, ſpake of him, being then Juſtice of Peace of the ſame County, Sir *William Maſham* is but an half eared Juſtice, he will hear but on one ſide. After Verdict upon Non guilty pleaded, and found for the Plaintiff, it was moved by Jones in arreſt of Judgment, That he hath alledged he was Juſtice of Peace by virtue of the Kings Commiſſion for ten years laſt paſt, which cannot be; for the King hath not reigned ſo many years; ſo it is impoſſible and contrary in it ſelf: and without ſhewing, that the words were ſpoken of him as of a Juſtice of Peace, the Action lies not. And of this opinion was all the Court, That if it be not ſufficiently ſhewn he was a Juſtice of Peace at the time of ſpeaking the words, and ſo no ſcandal to him as Juſtice of Peace, the Action lies not. But the whole Court conceived, although the firſt words, ſhewing he is a Juſtice of Peace by the Kings Commiſſion, &c. were void and apparently vitious (for it is impoſſible;) And if he had reſted there, and there had been no other ſhewing of his authority, the Action would not have lien: yet when he ſhews that he ſpake of him, ſuch words Adtunc Juſtice of the Peace (which is at the time of the ſpeaking of the words) that ſufficeth; And what was alledged before is but ſurpluſage and vitious. And for the words they held, That they were ſcandalous (being ſpoken of a Juſtice of Peace;) Whereupon it was adjudged for the Plaintiff. 10. 2 Cr. 90. R. 275. Yely. 143.

Sapkill *verſus* Stocker.

ACtion for words. After Verdict for the Plaintiff, it was moved in arreſt of Judgment, That here is a Miſ-trial, not aided by any Statute; for upon the Venire facias there were but twenty three Jurors returned, where there ought to have been twenty four; And the Trial was made by ten of the principal Panel, and two of the Tales de circumſtantibus. But Jones, Whitlock, and Hide chief Juſtice conceived, That, the Trial being made, the non returner of the twenty fourth is but a miſreturn of the Sheriff, which is aided by the Statute of decimo octavo Elizabethæ. And for this was the Caſe in Co. lib. 5. fol. 37. betwixt Tyrrill and Gardiner cited, where upon the Venire twenty three were returned, and the Trial was by twelve of them; That was good, and aided by the Statute. But againſt that 'twas urged by Maynard (and I my ſelf 11. Jones 245. 1 Rol. 800. Poſt. 278.

ſelf was of that opinion) That where the trial is by twelve of the principal, it is good. But if there were not twelve of the principal ſworn, it ſhall not be good. And for this purpoſe was cited the caſe in anno viceſimo Jacobi, betwixt Calthorp and News; where in like manner, a trial was by ten of the principal and two of the Tales, and it was adjudged a miſ-trial; whereupon it was adjourned. But afterwards upon conference with the Juſtices of both Serjeants Inns, the greater part of them conceived, It was but a miſ-return, and aided by the Statutes of decimo octavo Elizabethæ, & viceſimo primo Jacobi: And although the trial was by two of the Tales, it is not material to the parties, nor prejudicial to any of them, but only to the Jurors, who loſe their Iſſues; And it being but a Miſreturn by the Sheriff, was aided by the Statutes; Whereupon it was adjudged for the Plaintiff.

2 Cr. 647.

Termino

Termino Michaelis, anno ſeptimo *Caroli* Regis, in Banco Regis.

IN this vacation, *viz.* 25. Auguſt *Anno* 1631. Sir *Nicholas Hide*, chief Juſtice of the Kings Bench, being a grave, religious, diſcreet man, and of great learning and piety, dyed at his houſe in the County of *Southampton*; And Sir *Thomas Richardſon* chief Juſtice of the Cemmon Bench, was made chief Juſtice of the Kings Bench, and ſworn the 24. of *October*. He came to the ſaid Bench attended with divers of the Serjeants: And being in the Court (after a ſpeech by the Lord Keeper, ſignifying the Kings pleaſure, and his anſwering ſhortly thereto) he was ſworn, and his Patent read; which was a Writ under the great Seal, directed unto him by the name of *Thomas Richardſon, chief Juſtice of the com. Bench*, that the King had appointed him to be chief Juſtice of the Pleas, before himſelf to be held, and commanded him to attend the ſaid Office; which being read, he took his place in the Court: And the ſame day Sir *Robert Heath* was ſworn Serjeant in Chancery: And upon the 25 of *October* being Tueſday, came in his party-coloured Robes to the Common Bench and performed his ceremonies as Serjeant; and the ſame day kept his Feaſt at *Serjeants Inn* in *Chancery-Lane*, and gave Rings to every of the Judges, *quorum Inſcriptio fuit, Lex Regis, vis Legis*. And afterwards upon the 27. of *October*, being Thurſday, he was ſworn chief Juſtice of the Common Bench. And the next day after *William Noy*, one of the Readers of *Lincolns Inn*, was made the Kings Atturney General. 1. Jones 247. Ante 65. Poſt. 403.

Smith *verſus* Norfolk.

DEbt. As Adminiſtratrix to Smith her Husband, for two and twenty pounds due upon a Leaſe for years, made by the Inteſtate, for a Quarters rent due in the time of the Inteſtate, and two Quarters rent after his death; The Leaſe being made for one and twenty years by the Inteſtate, out of a Leaſe for years, whereof he was poſſeſſed; both of them having continuance for divers years yet to come. And the Action was brought in the Detinet only, And after verdict for the Plaintiff, Noy and Germin moved in arreſt of Judgment, that the Declaration was not good, Becauſe for the two laſt Quarters of Rent, due after the death of the Inteſtate, the Action ought to have been in the Debet & Detinet: And for that, they relyed upon Hargraves Caſe, Coke 5. fol. 31. But Jones, Whitlock, and my ſelf held, That the Action was well brought in the Detinet; ſhe having the intereſt only as Adminiſtratrix; And that Hargraves Caſe reported is not 3. 2 Cr. 238. Co. 5. 31. b. 2 Cr. 238.

2 Cr. 546. 3 Cr. 712.

Law: And Jones ſaid, he knew it to be reverſed in point of judgment for this cauſe; Whereupon Rule was given, That Judgment ſhould be entred for the Plaintiff, unleſs other cauſe was ſhewn, &c.

Tavernor *verſus* Skingle.

3. 1 Rol 247.

DEebt. Upon an Obligation of one hundred pounds conditioned to perform the Award of J. S. and J. D. ſo as they made their Award before the tenth of October following, under their hands and ſeals, and if they did not agree, then to ſtand to the umpirage of J. N. ſo as he made it in writing under his hand and ſeal before the twentieth of October following. The Defendant pleaded, That the ſaid J. S. and J. D. did not make any Award before the tenth of October, nor J. N. the Umpire, before the twentieth of October, &c. The Plaintiff replyes. True it is, that J. S. and J. D. did not agree, nor make any arbitriment before the tenth of October; but that J. N. the Umpire did make an Award before the twentieth of October, under his hand and ſeal, and ſhews it; wherefore inter alia, the Defendant was to pay to the Plaintiff thirty pounds upon ſuch a day, at the houſe of William Sutton in Chelmſford, being the ſign of the Cock, and for the non payment of the ſaid thirty pounds, alledgeth the breach; And thereupon the Defendant demurrs: And Wright for the Defendant moved, that this ſubmiſſion is void and incertain; for it is, if they do not agree, and it doth not appear to what they ſhould agree, and an incertain ſubmiſſion is void, ſed non allocatur: For the words, If they do not agree, have the intendment, if they do not agree and make their arbitriment under their hands and ſeals before ſuch a day; for otherwiſe it is quaſi no agreement within that condition. Secondly he moved, That this arbitriment by the Umpire was void; for he appoints money to be paid at the houſe of a Stranger, wherein by intendment the Defendant hath no intereſt, nor can compell him that is owner of the houſe to ſuffer money to be paid there; And an arbitriment ought not to appoint a thing to be done to a Stranger, or by a Stranger, over whom the Defendant hath not power, nor in a Strangers houſe, by which Act the Defendant might be a Treſpaſſer. See Coke lib. 5. fol. 77. 22. Hen. 6. 46. But all the Court agreed, That the arbitriment was good; for the appointment of the payment of the money at a Strangers houſe (eſpecially being by intendment a common Inn) cannot be unreaſonable, or ſhall make an unlawfull Act; but by intendment the Plaintiff will procure ſuch kindneſs, That the money may be paid there; and if the Stranger ſhall deny the payment to be there, it peradventure may be a good excuſe for the Defendant: But the arbitriment by it ſelf, prima facie, is good enough; Whereupon it was adjudged for the Plaintiff.

Moor. 3. Co. 10. 131 b. R. 106. 1 Rol. 247.

Pl. Com. 71. a. b.

Beamond

Beamond *versus* Long, quod vide ante fol. 208.

WAs now moved and argued by Maynard for the Defendant and by Rolles for the Plaintiff; And for the Plaintiff he first argued, that although the Husband shall not have a debt due to the Wife, after her death without recovery, yet if they bring debt and recover, and after the Wife die, the Husband shall have that debt, quia transit in rem judicatam; and although the Baron here should have execution in the right of his wife as Administratrix, he could not have it to his own use, but to satisfie the Debts of the Intestate: And when they are satisfied, he is chargeable over in Accompt to the next Administrator, or peradventure shall be chargeable for that Debt as an *Executor de son tort demesn*, And they having been at the charge to recover that Debt, and costs, and Damages, awarded unto them; It is no reason the Husband should lose them: And he cited one Presls case in nono Jacobi, in the Common-Bench, where an Administ. durant. minor. ætate, recovered in Debt, That the Executor at his full age might have Execution of that Debt: But all the Court (Hide chief Justice being dead, and none in his place) conceived, that this Scire facias, lies not; For the first Action was brought by the *Baron* and *Feme* Administratrix, which is in anothers right; And the recovery being thereupon, is in right of the Intestate; And the *Feme* being dead, the *Baron* cannot claim that Debt; For he not being Administrator hath not any interest therein: For the Administratrix being dead, the Suit is meerly determined, and cannot be revived by any, but by him who comes in, in that right, and so doth not the husband; And it differs not from the Case of vicesimo octavo Henrici octavi, cited in Cok. lib 5. Brudnells Case, fol. 9. b. where an Executor recovers Debt and dies Intestate; the Administrator cannot have a Scire facias because he is not privy to that Judgment, and he claims not *peramount* the Judgment, And they doubted of the Case cited nono Jacobi: But it is clear if Administration be committed, because no Will is extant, and the Administrator recovers in Debt, and after the Will is proved wherein there is an Executor, such an Executor shall never have a Scire facias upon that Judgment. And although it was objected, That the Judgment is for Costs and Damages, which belong to the *Baron*, although the said Debt did not belong unto him, And therefore the Scire facias should be maintained for the Damages: Yet the Court held, that the Scire facias to have execution of the Judgment, for the Debt, and also for the damages, is not maintainable, And whether he might maintain a Scire facias for the Damages and Costs, they would not deliver any opinion. Yet it appears decimo nono Edvardi quarti, If one recovers in a real Action Land, and Damages, and dies before Execution, the Heir shall have a Scire facias to have Execution for the Land, and the Executor for the Damages. But

4. Jones 248. 1 Rol. 889.

Ant. 208.

1 Rol. 888. 9. Godb 604.

1 Rol. 921.

Post. 464. 1 Rol. 889. R. 474.

Ante 167. Post. 451. 4. 2 Cr. 4.

Hob. 250. 1 Ro. 921.

for the principal case, they all held, That the Scire facias lies not as it is brought, And gave Judgment for the Defendant. And this Case being moved at the Table at Serjeants Inn to the chief Baron and other Barons, and to Justice Harvie, they all agreed in the same opinion. Vide postea 458.

Reynell *versus* Champernoon.

5. TRespass. For taking and cutting of his Nets and Oares. The Defendant justifies; For that he was seised in Fee of a several Piscarie: And that the Plaintiff, with divers others, indeavoured with their Oares to row upon his water, and with the Nets to catch his Fish: And for the safeguard of his fishing, he took and cut the Nets and Oares, &c. Thereupon the Plaintiff demurrs. It was moved by Bulstred Whitlock, That this Plea is not good: For he cannot by such colour cut the Nets and Oares. And of this opinion was all the Court, for the reason supra: But he might have taken the Nets and Oares and detained them as *damage fesant*, to stop their further fishing. Whereupon it was adjudged for the Plaintiff.

Tyler *versus* Wall.

6. TRespass of Assault, Battery and Imprisonment. Ultimo die Octobris, sexto Caroli, apud Withering, and carrying him to Tyverton, and detaining him in prison for two dayes. The Defendant justifies, Because decimo tertio Augusti, sexto Caroli, A Writ of Supplicavit de bono gestu, issued out of Chancery; And by a warrant from the Sheriff to the Defendant, being his Bayliff, he arrested the Plaintiff the twenty first of September, and detained him two days, and carried him to Tyverton, and delivered him to the Sheriff, which is the same Arrest, Detention, and Imprisonment, &c. The Plaintiff replyes and confesseth the Writ, Warranty and Arrest, the twenty first of September, and Imprisonment for two years, as the Defendant hath alledged. But shews, that he afterward found sureties before the Sheriff according to the Writ, and was discharged. And that the Defendant Postea, videlicet, prædicto primo Octobris, sexto Caroli, Assaulted and Imprisoned him, *de son tort demesn*. Et hoc, &c. And upon this, The Defendant demurrs. And now Hutchings for the Plaintiff, moved, That the Plea in Bar was not good, Because he doth not answer the time in the Declaration, videlicet, ultimo Octobris, neither by Answer nor by Travers. But Grimston for the Defendant, argued, That the justification being of an Act in the same County, and justifying all the time in the Declaration, although it doth not agree with it in the day, but concludes Quæ est eadem Transgressio, &c. is good enough, The day not being material. And all the Court was of the same opinion, and also conceived, That the Replication

Post. 573.

plication was not good, varying from the day in his Declaration, and is a departure therefrom; Wherefore, &c.

Hughs, Administrator of J. D. *versus* Harrys.

ACcompt. Against the Defendant: For that he occupied, as Guardian of J. D. for nine years, such Lands which were granted to W. D. father of J. D. and his heirs, by Copy of Court roll, tenendum secundum consuetudinem Manerii of O. who entred and dyed seised thereof, which descended to the said J. D. and the Defendant received the profits as Gardian; and afterwards J. D. dyed, and the Plaintiff, as Administrator unto him, brings the Action. The Defendant pleads, that he did not receive the profits as Gardian; and issue thereupon, and found for the Plaintiff. And now Grimston moved in Arrest of Judgment, First, That the Declaration is not good, Because he doth not recite the Statute of Marlbridge, according to the usual course in such Declarations; sed non allocatur: For being a general Law, it needs not to be recited. Also that Statute doth not give the Action, but is only in affirmance of the Common Law, as Coke Litt. 89. a. 12. Secondly, It doth not appear that they were Freehold Lands, but may be Copyhold: Then against such a person which occupies a Copyhold, accompt lies not; sed non allocatur: For although it be mentioned, That the Land is granted by Copy, it is not said, Tenendum ad voluntatem Domini; so it may be well intended a Freehold: And in Wales there be many Freeholds granted by Copy and by Veirg. And for the Plea, which was, that he did not receive as Gardian, And being found against him, it shall be intended lawfull Gardian; whereupon it was adjudged for the Plaintiff. 7. Post. 246. 514.

ACtion for these words, of an Atturney: Thou art a Knave, and stirrest up Suits betwixt parties; and stirredst up a Suit betwixt such parties to their undoing; and it is great pitty such persons should go unhanged. Adjudged for the Plaintiff, that the Action lies. 8. Post. 516.

Hollingsheads Case.

HOllingshead prayes a Prohibition to stay a suit in the spiritual Court for Defamation, for speaking these words: Thou art a Bawd, and I will prove thee a Bawd. And because these are words properly determinable in the spiritual Court, and for which no Action lies at the Common Law, a Prohibition was denyed. But for saying, Thou keepest an house of Baudry, This being matter determinable at the Common Law by Endictment, suit shall not be in the spiritual Court. Vide 27, H. 8, & Coke lib. 4. fol. 20. a. 9. Jones 246. 2 Ro. 296. Post. 261. Post. 361. 393. Post. 285. 329.

Sanders

Saunders *verſus* Corniſh. Trin. 5. Car. rot. 840.

10. 1 Rol. 612. R. 408 5. 10.

TReſpaſs. Of his Cloſe breaking at Weſtbrook. Upon Not guilty pleaded a ſpecial verdict was found, That Simon Sanders was poſſeſſed of a Leaſe for one hundred and threeſcore years of the Land in queſtion; And by his Will in writing, reciting that he had ſuch a Leaſe, deviſeth That his Brother Chriſtopher Sanders ſhould have the uſe and occupation thereof, and ſhould take the profits of it during his life; And after his death, the uſe and occupation ſhould remain to the Wife of Chriſtopher during her Widowhood; And after her Widowhood, the uſe, occupation, and profits of the Premiſes, to be and remain unto the eldeſt ſon of the ſaid Chriſtopher, which he ſhall happen to have during his life; And after, ſuch ſon dying without heir Male, to any other ſon which the ſaid Chriſtopher ſhall happen to have, one after another in form aforeſaid. And if the ſaid Chriſtopher happen to dye without Heir male of his body, And for that I have a purpoſe to have the ſame Leaſe kept in my name, My Will and meaning is, That the uſe and profits and occupation ſhall remain and be unto *Simon Sanders*, *&c.* in the ſame manner as before, &c. And ſo to divers others in the ſame words: And makes the ſaid Chriſtopher and Simon Sanders his Executors, and dies poſſeſſed: And that the ſaid Executors proved the Will and aſſented to the ſaid Legacy: That Chriſtopher entred, and dyed without Iſſue, and made the ſaid Simon his Executor; which Simon entred, and had Iſſue John, and the Plaintiff his eldeſt ſon, and after made John his ſon Executor, and dyed; and John proved the Will and entred, and made the Defendant his Executor and dyed: And that the Plaintiff entred, and the Defendant *ouſted* him: And if, &c, The queſtion was, whether this deviſe of a term in this manner be good to go in remainder? And if ſuch Remainders, the one after the other, and limitation of the Deviſe of a Leaſe, may be good? And all the Court inclined, in opinion, that the Deviſe of a term in this manner to make a perpetuity, cannot be good: For to limit a poſſibility after a poſſibility, and to limit the remainder of a term after a dying without iſſue, ſtands not with Law. But the Court would adviſe.

2 Cr. 198. Co. 8. 95. 2. 2 Cr. 461. Jones 15. 16.

1 Rol. 612.

Jenkins *verſus* Young. Paſch. 6. Car. rot. 53.

11. Jones 253.

ERror of a Judgment, in the County of Flints. The Error was aſſigned in the matter in Law. The Caſe being adjudged upon a ſpecial Verdict in an Ejectione firmæ, was, That tricesimo tertio Elizabethæ, one Meredith gave that Land to Edward Randall & his wife, Habendum to the ſaid *Baron* and *Feme*, to the uſe of them and the heirs of their two bodies; And for default of ſuch iſſue, to the uſe of Edward Morgan and heirs. And whether the *Baron* and

Feme

Feme have an eſtate Tayle, or but for their lives, was the queſtion? And it was there adjudged for the then Plaintiff, that it was an eſtate Tayl: And now argued by Littleton, That it was Error; For he alledged, that the Eſtate, out of which the uſe ſhould riſe, was but for their lives; and the uſe cannot make the Eſtate larger than the limitations: As 3. Eliz. Dyer 186. where Land was given to two for their lives, To the uſe of another for his life; If the Leſſees dye, the uſe to him to whom it is limited, is determined. But Jones Whitlock, and my ſelf, upon the firſt motion, conceived, that there is difference where an Eſtate is limited to one, and the uſe to a Stranger, there the uſe ſhall not be more than the Eſtate out of which it is derived; But not when the limitation is to two, Habendum to them, to the uſe of the heirs of their bodies, this is no limitation of the uſe, nor is the uſe to be executed by the Statute; But it is a limitation of the Eſtate to them and the heirs of their bodies; and they are in by courſe of Common Law. And ſo it ſhall be taken as a limitation to them and the heirs of their bodies, remainder to the other and the heirs of the other, that the Deed may be conſtrued according to the intent of him that made it. And Jones ſaid, that he had known this to be ſo adjudged in Wales before this time; Whereupon the Court would further adviſe. Et Adjurnatur. Poſt. 245. Poſt. fol. 245.

The King *verſus* Maynard.

INformation. For ingroſſing one hundred Buſhels of Salt, to ſell again, contrary to the form of the Statute of quinto Edvardi ſexti, cap. decimo quarto. Upon the Declaration it was demurred: And argued by Noy and Maſon, That this Information is not maintainable; Firſt, Becauſe Ingroſſing is no offence in it ſelf, nor Foreſtalling and Regrating were not in themſelves offences puniſhable before the Statute; Nor is ingroſſing in it ſelf unlawfull, but by conſequence, or by reaſon of the things bought and made dearer, which ought to be ſhewn in the Endictment or Information. Secondly, Becauſe it is not any victual within the words or intent of the Statute; For it is not Victual, but only Condimentum, and for preſervation of Victual: And he cited a Record Paſc. 18. Eliz. adjudged, That buying of Barley and converting it into Malt, and ſelling it, was no offence puniſhable in a Major, who ſold it; nor made him to be a Victualler (the Major being prohibited to ſell Victuals) And viceſimo Jacobi, adjudged likewiſe, that Hops were not Victuals within the Statute: And Paſc. 15. Jacob. rot. 36. adjudged, that buying of Apples to ſell again was not within the Statute of quinto Edvardi ſexti: And where it is mentioned 13. Eliz. cap. 25. That the Statute of quinto Edvardi ſexti doth not extend to buying of Oyles, Wine, and other Merchandiſe, except Fiſh and Salt; it is to be intended that was not in the point of Ingroſſing, but for Foreſtalling and Regrating, which 12. 3 Inſt. 195. 2 Cr. 214. 3 Inſt. 195.

which is prohibited. And it would be a great inconvenience, if Salt ſhould be within the Law to be victuals, to be prohibited to be ingroſſed; for then it ſhould extend to thoſe that carry Salt in Wains to be ſold, And would inforce every one to buy Salt by the buſhel or peck at Ships, or Salt pits, which the Law never intended, But the Law intends thoſe things, which are ſold in great quantity, uſually at every Market in every County, as Corn, Cattle, Butter, Cheeſe, &c. But if any ingroſs all the Salt with an intent to ſell it at his own price, and at unreaſonable prices, he may be thereof endicted as for an offence at the Common Law, and if it be found, he is finable, as appears by a Record, Paſc. 43. Ed. 3. rot. 19. ſhewn in Court; whereupon it was adjourned.

13. TRespaſs. By a Plaintiff being a *Feme ſole*. The parties being at iſſue and tryed by Niſi prius, and verdict for the Plaintiff, and damages and coſts. The Defendant *al jour in Banco*, pleads, that after the Verdict, and before the day, the Plaintiff took to husband one J. S. And ſhe being married, demanded Judgment, &c. And thereupon it was moved by Rolles, That
2 Cr. 646. this being a Plea ariſing after the Verdict, and before the day in Banco, cannot be pleaded, but prayed to have it diſallowed, and
Poſt 236. 3 Cr. 202. that ſhe ſhould have Judgment; for the Defendant hath no day to plead it. And of this opinion was the chief Juſtice and my ſelf, cæteris abſentibus; whereupon Rule was given, That this Plea
2 Cr. 323. ſhould be *ouſted*, And the Plaintiff ſhould have Judgment unleſs other matter ſhould be ſhewn, &c. Vide 4. H. 4. 3. 21. H. 6. 10. 21. H. 7. 33. 5. H. 7. 40.

The King and Barnes *verſus* Hill and Windſore

14. 2 Ro. 113. Godb. 450. INformation. Upon the Statute triceſimo ſecundo Henrici octavi: for buying of Titles of one who had not been in poſſeſſion for one year, nor had any Reverſion or Remainder. After Verdict upon Not guilty pleaded; and found for the Plaintiff, it was moved in arreſt of Judgment: First, Becauſe he recites the
Ante 135. Pl. Com. 38. a. Statute of triceſimo ſecundo, and miſrecites it in the date and in the continuance; For he recites it to be at a Parliament Inchoat. duodecimo Aprilis, and continued uſque viceſimo quinto Martii following, which is a miſpriſion in both: For although the ſecond Seſſions of the ſaid Parliament began the twelfth of April, yet
2 Cr. 111. the Parliament began the twenty eighth of April triceſimo Henrici octavi, and the ſecond Seſſion began the twelfth of April triceſimo primo Henrici octavi; And the continuance by prorogation, was not untill the twenty fifth of March, but untill viceſimo quinto Maii et ab inde uſque Julii, and then diſſolved; wherefore for this miſ-
2 Cr. 133. priſion, although it be a general Act, and recited where it needs not to be recited, yet that miſrecital makes it ill, Vide Plow. 78. But Rolles for the Plaintiff ſaid, that although the Statute is miſrecited,

misrecited, yet it is not material; for he doth not alledge, That it is an offence against the Statute aforesaid, for then he had tied it to the Statute recited: But it is alledged, That he bought pretended Rights, contra formam Statuti in hujusmodi casu editi prout. But the Record being viewed, it was, That the Defendant Statutum predictum minime curans, and relied upon the Statute recited; And there is no such Statute, &c. The second exception was, because it is alledged, That the Defendant Hill, not being seised of such Tenements, nor having a Remainder or Reversion therein, conveyed and granted tricesimo primo Octobris, quarto Caroli, those Tenements by way of Maintenance and Champarty to the said Windsore; and for confirmation of the said Conveyance, the said Hill and Susan his wife, by fine, Hillarij quarto Caroli, granted the said Tenements to Windsore, and doth not aver in facto, that it is a pretended Right, &c. as he ought to do; For that is the point of the Action. The third exception, Because the value of the Land at the time of the Fine was 800l. And he doth not shew what was the value of the Land at the time of the bargain of those Tenements: And it may be, they were of better value at the time of the fine, than at the time of the grant, and the grant of them is the offence. The fourth exception, Because the Verdict finds Hill and his wife guilty, and the wife was not party to the suit; wherefore, &c. And the whole Court conceived, that these defaults in the Information made it ill, and that the Verdict was ill. But they would advise thereupon. Pl.Com. 87.b.

Mathews *versus* Whetton, Hill. 4 Car. rot. 496.

15. Jones 249. 1 Roll. 508. 10.

TRespass. Upon a special Verdict, the case was, a *Feme* Copyholder for life, takes *Baron*. The *Baron* makes a Lease to one vicesimo quinto Martij, tertio Caroli, by Indenture for a year. And by another Indenture dated the same day and year, makes a second Lease to the same party, for a year, to commence vicesimo septimo Martij, after the end of the said first Lease; and by a third Indenture bearing date the same day and year, makes a Lease to him for a year, to begin the twenty ninth of March, next ensuing the end of the second Lease; and so betwixt each Lease two days, betwixt the beginning of the new Lease, and the end of the former. And after the *Baron* surrenders his Copyhold to the Lord, who enters and lets to another for forty years. And after, during the second Lease, the first Lessee enters, and the Lords Lessee *ousts* him; and if the Entry of the Lords Lesse be lawful, &c. They pray the discretion of the Court, &c. And now Rolles argued for the Plaintiff, the first question he made, was, Whether the first Lease be a forfeiture? And he argued, that it should not be a forfeiture; For by the Law of the Land, every Copyholder may make a Lease for a year without forfeiture; and here is but a Lease for one year: And although it may be objected, It is a devise Co. 9. 75. b.

to avoid a forfeiture, and *Covine & Fraud*, which the Law will not favour: Yet he said, Fraud and practice shall not be intended, unless it be found. The second question, Admitting it be a forfeiture, yet the Lord taking a surrender and not entring for the forfeiture, but making a Lease for years, his Lessee shall not enter for the forfeiture: 2 Cr. 101. For the Lessee cannot, when the Lord allows thereof. 1. Rol. 508. But Grimston for the Defendant argued, That it is a forfeiture; For the three Leases being all made at one time, shall be intended one intire contract, and not warranted by the custome, 2 Cr. 301. 308. But is fraud and practice apparent to deprive the Lord of his forfeiture, And this *Covine* needs not to be found, as a Lease for three hundred years is *Mortmain*, and a Joyntress within the Statute of undecimo Henrici septimi, Co. 3. 51. makes a Lease by fine for five hundred years; This is a forfeiture as well as an Alienation of the Freehold of the Land; For it is an equal mischief, and denied, that a Copyholder make make a Lease for a year by the Law of the Land, and the general custome of the Realm; For he ought to have a special custome, otherwise it is not good, unless it be for the trial of a Title, which hath been Moor 272. allowed, Because it is for reducing a Right, and for the Lords benefit. To the second he said, Admitting it is a forfeiture, yet the 1 Rol. 510. Lords acceptance of the surrender, not knowing of the forfeiture, is no dispensation therewith, and consequently that the Lords Lessee hath a good Estate and Right in him, for which his entry is lawful. And Jones, Whitlock, and my self, were of that opinion; Whereupon a Rule was given upon the first argument, That Judgment should be entred for the Defendant, unless other cause was shewn. And another day being moved again, Richardson chief Justice being then present, although he doubted at the first, For the second point, It was adjudged by his consent for the Defendant.

Holyday *versus* Oxenbridge.

16. Jones 249. 2 Rol. 546. TRespass of Assault, Battery, Wounding, and Evil intreating, at London, &c. The Defendant pleades, quoad the wounding Not guilty, quoad residuum of the Trespass he pleaded, That diu ante tempus quo &c. The Plaintiff, apud Bedington in Comitatu Surrey, communiter usus fuit an ill Trade called 3 Cr. 90. cheating at play of divers the Kings Subjects with false Dice, and defrauding them of their money; And for the using of his said ill Trade, wandring up and down the Country, to find out persons inexpert at playing at such games, to deceive them of their money. And in his such wandring the Country, to such intents, tempore quo, &c. came to the house of Sir Nicholas Carew at Bedington aforesaid, to find any whom he might by playing with false Dice dispoil of his money: where finding the Defendant and one William Arnold in such play unexpert, desired them to play with him in the said house; whereupon the Defendant, and the said William Arnold

Arnold not ſuſpecting any hurt or deceit, prædicto tempore quo,&c. play'd with the Plaintiff in the ſaid Houſe of Sir Nicholas Carew at Dice for money, (the ſaid Sir Nicholas being in the houſe, and a Juſtice of Peace of the ſaid County) And the ſaid Plaintiff playing with the Defendant and the ſaid William Arnold with falſe Dice, ſubtilly conveyed by the Plaintiff (divers ſums of the Defendants money, falſo & fraudulenter depredatis) would preſently have departed from the houſe, and ſought to eſcape: But the Defendant knowing certainly, that he was deceived by the ſaid falſe Art of cheating with falſe Dice, prædicto tempore quo,&c. Molliter manus impoſuit upon the Plaintiff to bring him before the ſaid Sir Nicholas to be examined concerning the ſaid offence: And he examining and finding him upon his examination various and uncertain in his anſwer, bound him by recognizance to appear at the next Seſſions for the Peace of the County of Surrey; at which Seſſions he appearing, was endicted and convicted of the ſaid offence, which ſaid impoſing of his hands and bringing him before Sir Nicholas Carew, ex cauſa predicta fuit reſiduum tranſgreſſionis prædictæ; And Travers the Treſpaſs in London or elſewhere, except at the ſaid houſe of Sir Nicholas Carew. Upon this Plea the Plaintiff demurred. And now Germin for the Plaintiff moved, That the Plea was not good; For one cannot without an Officer for any cauſe, and that upon his own ſuſpicion only, arreſt or ſtay any perſon unleſs in Felony, eſpecially in his own caſe; Wherefore, &c. But all the Court (the chief Juſtice being abſent) held the Plea to be good: For it is ſhewn, That he was a common cheater, and that he cozened with falſe Dice, and therefore the Defendant led him to a Juſtice of Peace, being in the ſame houſe: And it appears by the Plea, That there was good cauſe of ſtaying him; For he is afterward endicted and convicted of that offence; And it is pro bono publico, to ſtay ſuch offenders: And the cauſe of the ſaid arreſting, ſtaying, and bringing him before a Juſtice of Peace, being by demurrer confeſſed to be true, They held it to be a good Plea; and that the Plaintiff had no cauſe of demurrer; whereupon, Rule was given to have Judgment entred for the Defendant,&c. 2 Cr. 498.

Lakins *verſus* Sir John Lamb and Holt.

QUare Impedit. Of the Church of Segrave in the County of Northampton. The Plaintiff intitles himſelf by grant of the next avoidance. Sir John Lamb pleads to the Iſſue Non conceſſit, as the Plaintiff Counts; and Iſſue being joyned, it was tried by Niſi prius. Holt the other Defendant pleads a Plea, whereupon it was demurred: and the Verdict being found for the Plaintiff in Summer Aſſiſe, and the Poſtea being returned at Octabis Michaelis, the entry was, Curia adviſare vult of the Judgment upon the Verdict and Demurrer: and day was given unto the Plaintiff and Holt, uſque Octabis Hillarij; and then Judgment was gi- 17.

ben for the Plaintiff, as well upon the Verdict as upon the Demurrer. And because no day was given to Sir John Lamb, against whom the Verdict is found, it was by Mr. Grimston assigned for Error: For that the Judgment not being given the same Term in which the Postea was returned, but at another Term, day ought to have been given to all the parties, and therefore it is a Discontinuance; and Discontinuances after Verdicts, are not aided. But all the Court held, It was not any discontinuance: For the Verdict being found against Sir John Lamb, he is out of the Court, and no day shall be given to a Defendant against whom a Verdict is found: For he hath no day in Court to plead any thing. But in this case day is only to be given to the party who is to plead to the Demurrer. And divers presidents were shewn here in the old and new Book of Entries, where the entry is only in such manner; wherefore it was held no Error. Afterwards Judgment was affirmed.

Ante 232. Post 380. 2 Cr. 528.

Mot and Alice his Wife *versus* Butler, Trin. 7 Car. rot. 5.

18. ACtion for words. Whereas there was communication betwixt the Defendant and J. S. of one Sibill Goodwin and of Alice the Plaintiff, That the Defendant spake these words of the said Sibill and the said Alice: Sibill Goodwin (innuendo the said Sibill Goodwin) hath stoln away such Goods (mentioning what they were;) And she (innuendo the Plaintiff) was privy and consenting thereunto. After Verdict, upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgment, That the communication being of two, and not specially of Alice, But she, innuendo the Plaintiff, there cannot be any reference to the Plaintiff: So the words do not appear to be spoken of her; and the innuendo will not help: And cited for that Co. 4. fol. 17. b. Roberts Case. But the Court held, It was certainly and sufficiently alledged: For the words are to be referred singula singulis. And when it is said Sibill Goodwin stole such Goods, and she (innuendo the Plaintiff) was privy and consenting, &c. this word (she) cannot be referred to Sibill, but to the Plaintiff. And for the words, That she was privy and consenting to the stealing of the Goods, there is good cause of Action. For she accuseth her to be Accessory; whereupon it was adjudged for the Plaintiff.

Jaxon *versus* Tanner.

19. ACtion for words. For that he said of the Plaintiff, being a Merchant, Thou art a Rogue and a beggerly Fellow, and I shall prove thee a Bankrupt before the next Term: and for that he said afterwards, upon the same day, to one John Harris of the Plaintiff, Trust him not, for he will be thy undoing. The Defendant pleaded Not guilty; and it was found for the Plaintiff; and intire damages given by the Jury. Whereupon it was moved in arrest of Judgment

ment by Holborn, That these words are alledged to be at several times: And for the words spoken the first time, the Action may lye; but for the words spoken afterwards, the Action lies not; and damages being intire, there can be no Judgment: For the Court shall intend, that damages were given as well for the second as for the first speaking, when both issues are found for the Plaintiff. Post. 328. But for words spoken at one time, if damages be found, the Court shall intend they were given for the words only which are actionable, and not for the other. But the Court conceived in this Case, That the words spoken at the second time are as well actionable as the words at the first, and aggravates the first words: For when he first called him a Bankrupt, and I will prove him a Bankrupt, &c. it lies for these words (but not for the words Rogue or Beggerly fellow;) And when afterwards he said to another, Trust him not, for he will undo thee, they tend to the same sense: Whereupon Judgment was given for the Plaintiff, unless other matter were shewn to the Court. And being another day moved again, Richardson, chief Justice, conceived, there was not any difference betwixt these words, I will prove thee a Bankrupt, and I shall prove thee a Bankrupt by such a time: And he held, that the Action well lies for any of the said words.

Facy *versus* Long.

20. PRohibition. A question was moved, Whether Tythes shall be paid for the depasturing of Sheep for ones Family only, and not to be sold? For the Prescription was, that he paid the tenth pound of wooll of all Sheep sold there and depastured. But Maynard moved, That notwithstanding the payment of the tenth fleece, he should pay for the Pasturage of his Sheep eaten in his house. But all the Court held, That Tythes shall not be paid for any Cattle eaten in the Family, no more than for Cattle reared for Paile or Plough: And a president was cited Hillarij nono Jacobi, that so it was resolved. Jones 254. 1 Rol. 647. Moor 909. 3 Cr. 476. 1 Rol. 647. 2 Cr. 430, 576.

Margaret Hinde *versus* Episcopum Cestriæ.

21. PRohibition. Because the Defendant sued in the Consistory Court of Chester, before the Commissary there, for a Mortuary, after the death of William Hinde, a Priest of the said Diocess, surmising, That by custome there, he ought to have for a Mortuary after the death of every Priest dying within the said Archdeaconry of Chester, the best Horse or Mare, his Saddle, Bridle, Spurs, his best Gown or Cloak, his best Hat, his best upper Garment under his Gown, his Typpet, his best Signet or Ring, as to the Bishop de debito consuet. fore supponitur; and recites the Statute of vicesimo primo Henrici octavi, concerning Mortuaries. And he avers that there is no such custome there; and that he had

had paid a Mortuary to the Parson of Bumberry: and that after a Prohibition the defendant had prosecuted his Suit there. Noy, Atturney General, moved for the defendant, that consultation should be granted. The first question was, This suit being for a Mortuary in the Archdeaconry of Chester, and the doubt, whether there were a custome in that place to have such things for a Mortuary, whether this be just cause of Prohibition? Or that this suit being for a Mortuary is meerly triable in the Spiritual Court? and it was alledged on the defendants part, That this is meerly triable in the Spiritual Court upon the Statute of Artic. Cleri, which saith, That where a Suit is for a Mortuary, Prohibition shall not be granted: And in Fitz. Nat. Brev. 53. and 51. 10 H. 4. 2. where custome is alledged for the payment of a Mortuary, it is said this custome is triable in Court Christian: And 13 R. 2. Jurisdiction 20. Kelloway fol. 110. where suit is for a Mortuary, consultation shall be awarded. But Calthrop for the Plaintiff moved against it and said, True it is, before the Statute of vicesimo primo Henrici octavi if there were a suit in Court Christian for a Mortuary, consultation should be granted; Vide Doct. & Student fol. 176. and the Book of Entries; but the course is otherwise since that Statute. But the second question, Whether consultation shall be granted upon a motion, without answering to the Prohibition? And that was moved by Noy, That it shall; Because the suit being for a Mortuary, there is no cause of Prohibition; therefore consultation should be granted. And of that opinion was Jones and Whitlock, That a Prohibition ought not to have been granted, it being a suit for a Mortuary; and although it was alledged, It is now grantable upon the Statute of 21 Hen. 8. they conceived, that by the Proviso therein, Mortuaries shall be paid in the Archdeaconry of Chester, as before they have been accustomed; so it is out of the Statute: And the custome for payment of Mortuaries being in question, is triable in Court Christian: And although Prohibition hath been unduly granted, yet it is no discretion in the Court to grant a consultation upon motion without answering. But Richardson and my self held, that no consultation ought to be granted: For the surmise in the Prohibition is
3 Cr. 151. good, that there is no such custome, to have such Goods for Mortuaries, as is surmised; and that may well be tried by the course of the Common Law: For now the Statute appoints what shall be paid for Mortuaries: And that in the said places, in Wales and Archdeaconry of Chester, such Mortuaries shall be paid as have been accustomed, which is issuable and triable at the Common Law, especially as this case is, wherein the Plaintiff pretends and surmiseth, that she paid the Mortuaries to the Parson of Bumberry, in which Parish the said Priest inhabited: And that there is no such custome, she should pay it to the Archdeacon. Secondly, We held as this Case is, no consultation ought to be granted upon motion, without answering to the Prohibition; Because the Plaintiff

tiff in her Declaration upon the Prohibition shews, That the Defendant hath sued after the Prohibition, which is a contempt and ought to be answered, but peradventure in some Cases, when the Prohibition appears in it self to be unduly granted, the Defendant before appearance, having committed no contempt in prosecuting thereof, may move to have a consultation; whereupon it was appointed, that the Defendant should plead or demur, and then the Court would give Judgment upon the Record before them, &c.

Mills *versus* Mills.

A *Action sur le Case in nature del conspiracy.* Whereas the Defendant with J. S. falso & malitiose conspired to procure him to be indicted of such a Felony, That the Defendant falso & malitiose, such a day procured him to be Endicted, whereby he was much vexed, &c. After Verdict, in arrest of Judgment, Littleton moved, That this Action lies not, because he did not sue the other as well as the Defendant; For conspiracy ought to be against two, sed non allocatur: For Action upon the Case may well be against one of them; whereupon it was adjudged for the Plaintiff. 22. F.N.B. 114.D. 116. N.

Walsh *versus* Bishop, Hill. 6 Car. rot. 954.

ERror. Of a Judgment in the Common Bench, in Trespass of Battery against two. They plead several Pleas, The one Not guilty, the other Justification; whereupon several Issues were joyned, and the Jury found both Issues for the Plaintiff, and assess several damages, but joint costs. And afterwards the Plaintiff caused a Nolle prosequi to be entred against the one, which was entred accordingly; and takes Judgment against the other for the damages found against him, and the costs. And the Error assigned by Littleton was, Because a Nolle prosequi against the one before Judgment entred, is quasi a release unto him, which shall inure to the other, and abate the Writ for both. But if he had prayed Judgment against the one, and had it, then he might enter a Nolle prosequi against the other. And that entry of a Nolle prosequi against the one after Judgment, shall not abate the Writ, nor be a release to the other: and for that was cited 14 Ed. 4. 6. But it was answered by Mr. Grimston, That this Nolle prosequi is not a release in it self, but an acknowledgment, That he will not proceed as against the one; which the Plaintiff may well do in Trespass, where the Defendants sever themselves by pleading, and there be several Verdicts against them; and so there be divers presidents where Nolle prosequi's are entred as well before Judgment as after; and so is the old Book of Entries; whereupon the Court would advise. 23. Post. 243.

Robinson

Mounſon *verſus* Cleyton, Trin. 6 Car. rot. 1343.

24. Poſt. 255. CCire Facias. To have Execution upon a Judgment in Debt. The Defendant pleads, That at another time the Plaintiff had ſued execution by a Capias ad ſatisfaciendum, and the Defendant was taken in Execution. The Plaintiff replies, That true it is, he ſued a Capias ad ſatisfaciendum, and the Defendant was taken thereupon, But he preſently reſcued himſelf and eſcaped. The Defendant demurs thereupon. And all the Court conceived, that the Replication was good: For the Plaintiff, not having the fruit of his Execution, may have a new Execution; and it is not reaſon the Defendant ſhould take advantage *de ſon tort demeſn*: And as there is no cauſe for the Defendant to have an Audita Querela when he is eſcaped and taken again, unleſs it be for a voluntary permiſſion by the Sheriff; ſo there is not any bar for him to have new Execution: And although it is no good return upon a Capias ad ſatisfaciendum, That the Defendant reſcued himſelf (for the Sheriff at his own peril ought to have kept him) nor any Plea in Debt upon an eſcape; yet the party himſelf ſhall never take advantage of his own tortious act. And as it was ſaid, that it appears the Plaintiff might have his remedy as well againſt the Sheriff as againſt the Defendant; ſo it was anſwered, That doth not take away his remedy againſt the party who eſcaped, unleſs the Defendant ſhews, that the Plaintiff had ſued the Sheriff and recovered againſt him; and it may be the Sheriff here is dead, and then no power to ſue his Executors: Wherefore, it appearing that the remedy remains againſt the party himſelf, Rule was given, that Judgment ſhould be entred for the Plaintiff, unleſs, &c. 29 Aſſ. 41. Co. 3. 44. b. et 52. b.

R. 34. F.N.B. 246. b. Hob. 60. Poſt. 255. Moor 57. Ante 75. 153. Yelv. 52. Ante 75, 109, 255. 2 Cr. 486. 3 Cr. 478. Ante 109.

Wells, Adminiſtrator durante minore ætate of J.S. *verſus* Some.

25. ACcount. Againſt the Defendant as Bailiff and Receiver, and ſhews only, that he was Bailiff of ſuch a Manor, &c. The Defendant pleads to the Iſſue, and found againſt him. And in arreſt of the Judgment the firſt exception taken, was, Becauſe he doth not ſhew that J. S. is within the age of ſeventeen years; and it may be he is under age, and yet above the age of ſeventeen years; ſed non allocatur: For it ſhall not be intended, unleſs it be ſhewn, that he was above the age of ſeventeen years, when the other hath admitted him to bring the Action, and pleaded to the Iſſue. The ſecond exception, That the Declaration is not good, was, Becauſe he charges him by the name of Bailiff and Receiver, and afterwards doth not ſhew any charge againſt him as Receiver, ſed non allocatur: For it is the more for the Defendants benefit; whereupon it was adjudged for the Plaintiff.

Co. 5. 29. a.

Termino

Termino Hillarij, anno ſeptimo *Caroli* Regis, in Banco Regis.

Milles *verſus* Milles.

1.

ASſumpſit. For that the Defendant, in conſideration of Marriage, promiſed to the Plaintiff twenty pounds, to be paid in manner & form following, viz. ten pounds at Michaelmas 1631. & ten pounds reſidue at Michaelmas 1632. And for the non-payment of the firſt ten pounds he brings the Action. The Defendant pleads non Aſſumpſit, and found againſt him, to his damages twenty pounds, and coſts two pounds thirteen ſhillings four pence. And it was moved by Mr. Grimſton in arreſt of Judgment, firſt, that the Action lies not till after Michaelmas 1632. & compared it to an action of Debt grounded upon a ſingle Bill for ten pounds to be paid, viz. five pounds at our Lady-day, and five pounds at Michaelmas: Debt lies not untill the laſt day. Secondly, Here be damages given for the laſt day which is not yet come. But Jones, Whitlock, and my ſelf (Richardſon chief Juſtice being abſent) agreed, That the Action well lies before the laſt day, being an Action upon promiſe or Covenant: For the breach is immediately for the firſt 10 l. not being paid at the day, and for this breach the Action well lies. But we held it to be otherwiſe in Debt, the Contract or Bill being entire. Secondly, we agreed, that the damages of twenty pounds ſhall be intended given for the firſt ten pounds, and that he ſhould have ſo much damages for non-payment thereof only, without any reſpect to the ten pounds which is not yet due: Whereupon it was adjudged for the Plaintiff. Vide 2 et 3 Ph. et Mar. Dy. 113. a.

1 Rol. 29. Co. Litt. 292. b. 1 Rol. 29. Go. 4. 94. l. 3 Cr. 118. Mo. 13. 1 Rol. 29. 2 Cr. 505. Poſt. 350.

Cooks *verſus* Douze.

ERror of a Judgment in Winton. Where the Plaintiff declared, that he lent to one Wheeler twenty pounds at the Defendants requeſt, and that the Defendant, in conſideration the Plaintiff would reſt content and forbear the ſaid money per paululum tempus, promiſed upon requeſt he would pay; and alledges in facto That he forbore per paululum tempus, and required payment; and the Defendant had not yet paid, although he required payment at ſuch a day. After non Aſſumpſit pleaded, and Verdict and Judgment given for the Plaintiff, it was aſſigned for Error that to forbear per paululum tempus, is not any conſideration, becauſe there is not any certainty therein: And Foſter ſaid, there be divers preſidents, that it hath been adjudged to be ill. But all the Juſtices abſente

Poſt. 438. 2 Cr. 250. 683.

lente Richardson) held, That it was well enough. For when the money was lent to Wheeler, and long before, and the Plaintiff upon the Defendants request agreed for a longer time, and to accept of the payment from him when he should be required; and alledges in facto, That he forbore till the day of his Action, and that he requested, &c. It is sufficient; whereupon Rule was given, that Judgment should be affirmed.

Post.438. 2 Cr.256. 683. Post.273.

Berry *versus* Heard. Hill. 19. Jac. rot. 1444.

3. Jones 255. 2 Ro.119. Ben.141.

Action sur Trover & Conversion. Of a load of Bark or tinde of Oake. Upon Not guilty pleaded, a special Verdict was found, That this bark was the bark of an Oake being Timber, growing in such Land, whereof the Plaintiff was seized in Fee, and had let the Land whereupon the Tree grew to I. S. for years; And that the Defendant, during the said Term, (which yet continues) entred and cut down the said Tree, being a Timber-tree, and carried away the said load of bark thereof, and converted the same to his own use. And if, &c. The sole question herein was, If a Stranger cuts down a Timber-tree in the time of Lessee for years, and carry that or the bark thereof away, whether the Lessor, during the said Term, may have an Action of *Trover* for it, or be put to take his remedy against the Lessee by an Action of Waste; And the Lessee to have his remedy by Action of Trespass or *Trover* against him who cut it down? Or whether the Lessor, at his election, may punish the one or the other? And this Case being long depending, and divers arguments therein before I came to the Bench, and the Judges differing in their opinions, it was argued after I came to the Bench, and Jones and Whitlock said that they always were of opinion, That the Action well lies for the Lessor, And that he hath election to sue the Lessee for the Waste or him who cut down the tree: For the tree being Timber, the general property is always in the Lessor notwithstanding his Lease, And the Lessee for years hath but a special property therein, to have the shadow and fruits thereof as long as it is growing, and not otherwise: And when it is severed from the Land, the property which the Lessee had therein, is lost, And then the property thereof is only to the Lessor; so as he may have an Action for the carrying it away, or Action *sur Trover & Conversion*: And that such property which he hath by the Common Law, always remains in him, notwithstanding the Statute of Gloucester, which give him the Action of Waste to punish such cutting down: And they said, That Lee chief Justice was of their opinion. But Doddridge was always of the contrary: And they said, A Rule was once given that Judgment should be for the Plaintiff; and they marvailed it was not entred. And now Richardson chief Justice said he was of their opinion, that the property of the Timber-tree, when it is cut down, is no longer in the Lessee; for his interest is in it only during the time it is growing upon the Land, and that afterwards it remains only

Post.274.

Mo.19. Co.11.81.b. Post.274. Moor.19.

only in the Lessor, so as he alone shall have an action of *Trover* for the carrying it away. But I was always of the contrary opinion, that the Lessee solely, during the term, ought to have an action for the carrying away of it, and not the Lessor: For the possession and property is vested in him during the term, and is not lost by his cutting down, nor by the cutting down of a Stranger; and that he is chargeable in an action of waste to answer treble damages to the Lessor; and so the Lessor having sufficient remedy, it is reason the Lessee should have the action against him who cuts it down and carries it away, to have recompence; and the recovery by the Lessor in an action of *Trover*, is no barre, for the Lessee to plead in an action of waste: nor is it reason a recovery of single damages against him who cut down the said Timber, should be a barre in waste, where he is to recover treble damages; therefore the Lessor during the term, ought to have his remedy only against the Lessee, and he over against him who cut down the said tree. But notwithstanding, upon their three opinions, it was adjudged for the Plaintiff. See Cok. 4. 62. Cok. 5. 76. Cok. 11. 48. & 81. Dy. 90. 44. Ed. 3. 5. 10. H. 7. 2. Cok. Lit. 220. a. Co. Littl. 54. a.

Walsh *versus* Bishop. (quod vide ante pag. 239.)

4.

2 Ro. 100. l.

WAs now argued again by Littleton, Recorder of London, for the Plaintiff in the writ of Error, and by Henden Serjeant for the Defendant. The errors insisted upon were, first, that the Jury ought not to have given several, but joynt damages. Secondly, that the entry of a nolle prosequi before Judgment is quasi a confession of his action to be false against one, or a release unto him, which being before Judgment is, as it were, a release to both. But the Court (absente Jones) conceived, that there was not error in either of them: For, first, when the Plaintiff hath relinquished his suit against the one, although in truth there ought to have been inquisition but once of the damages, and not severally, yet it is not material when no advantage is taken thereof. And as to the second, It is not a confession that this writ is false, nor an absolute release to the one, But it is, as it were, an agreement, that he will not proceed against the one; and his acknowledgment is an absolute barre as to him, and proceeding may be against the other. As if one pleads a Plea, and there is a demurrer thereupon, and the other pleads to the Issue, and it is tryed, It is an usual course to enter a Nolle prosequi against him who pleaded the Plea whereupon the demurrer was, and to pray Judgment against the other. So where they sever themselves by several Pleas, he may enter a Nolle prosequi against the one, and have his Judgment against the other: and divers precedents being shewed on both sides, that such Judgments have been so entred, the Judgment was affirmed. Vide 18 Ed. 4. 26. 5 H. 5. 1. The Book of Entries 585. 589. 5 H. 7. 24. 11 H. 7. 5.

Co. 11. 7. a. 3 Cr. 860. Ante 55.

Post. 551. Hob. 70.

Copland *versus* Pyatt, Trin. 6. Car. rot. 687.

5. Jone. 254. Ejectione firmæ. Upon a special Verdict the case was, that William Bertram seised in Fee, having three daughters, by Indenture betwixt him and Robert Bagley, in consideration of 400 l. paid by the said Robert Bagley, & in consideration of a marriage had betwixt Robert Bagley son and heir of the said Robert Bagley, and Margaret eldest daughter of the said William Bertram, & preferment of the blood of the said William Bertram, Covenanted to stand seised, to the use of the said Robert the son, and the said Margaret his wife, and the heirs of her body, and for default of such issue, to the use of his other daughters, and the heirs of their bodies, the Remainder to the heirs of the said William. The Husband dieth having no issue, and Margaret his wife, by Fine conveyed it to the Defendant, upon whom the issue entred, as for a Forfeiture by the Statute of 11. H. 7. and whether it were a Forfeiture or not, was the question; and it was resolved, that she was not a Joyntress within that Statute, notwithstanding the 400 l. paid by Robert Bagley the Father; for the Land first moved from William Bertram the wifes Father, and the preferment of the blood of William Bertram, shews the intent, that the Husbands heirs should not be preferred, but the wifes, for the meaning of the makers of that Law, was only to disenable women who have any Estate in Dower, or for life, or in Tayle, joyntly with their husbands, or only to themselves of the Inheritance or Purchase of their husbands; or given to them by the Ancestors of their husbands, or other persons seised to the use of such husbands or their Ancestors, when they become sole, or with any other after-taken husband, from making such alienations, whereby the heirs of such husbands might, and before the making of that Law, were frequently disinherited: But in this case the advancement is by the Ancestors of the wife, & is not of the purchase of the husband or his Ancestors, nor assured by the husband or his Ancestors. And in this case the Bishop of Exeters case was cited, who in consideration of kindred to the woman, and service done by the man, gave certain Lands to them in tayle; and it was adjudged, that the wife, after the death of the husband, had no Estate within the said Statute of 11. H. 7. and that she might sell it, because the Land came not from her husband nor any of his Ancestors, nor from any seised to the use of her husband or his Ancestors. Vide Crooks 2. Part of his Reports, Termino Trin. 5. Jac. Banc. Regis, in the case betwéen Ware & Walthew. And therefore it was adjudged for the Defendant, Vide Mich. 19. Jac. Kinaston *versus* Lloyd. Et Pasc. 16. Jac. B. R. Kirkman, *versus* Thomson.

Co. L. 366. a. Pl. Com. 464. b. 2 Cr. 474. 624. 2 C. 174. 2 Cr. 624.

Meredith *versus* Joans, Pasch. 6. Car. rot. 53.

6. Ante 230. 231 Error of Judgment in Flintshire. The Error was assigned in point of Law, viz. That Judgment was given there upon a special

special Verdict for the Plaintiff, where it ought to have been for the Defendant. The Case was, Land was given to *Baron* and *Feme*, Habendum to *Baron* and *Feme* to the use of them and the heirs of their bodies. The question there was, whether it were an Estate for Life only, or an Estate Tayl? And it was adjudged to be an Estate Tayle; And now argued by Littleton Recorder of London for the Plaintiff in the Writ of Error: And by Calthrop for the Defendant. And all the Court (absente Richardson) held, That the Judgment ought to be affirmed; For they conceived, That this limitation in the Habendum, to the use of the Grantees and the Heirs of their Bodies, is as a limitation of the Land it self, being all to one person; and is as if it had been said, Habendum to them and to the Heirs of their Bodies; And not like to the case 2 & 3 Eliz. Dyer. 186. For true it is, when the Estate is limited to one or two, to the use of others and their Heirs, the first Estate is not enlarged by this Implication, and the use cannot passe a greater Estate. But here when the Grant and Habendum convey the Estate, and the limitation of the use is to the same person, that shews the intent of the parties, and is a good limitation of the Estate; For it is not an use divided from the Estate, as where it is limited to a stranger, but the use and Estate go together; wherefore it is all one, as if the limitation had been, to them and the Heirs of their Bodies. And Jones said, that he knew many Conveyances had been made in this manner, and twice brought in question, and adjudged to be an Estate Tayl; whereupon Judgment was affirmed.

Ante 230. 231. 2 Cr. 401.

Swayn and others *versus* Stephens, Hill. 6. Car. rot. 1243.

Action sur Trover & Conversion. Of a Ship and nine pieces of and declares, That primo Martii, vicesimo primo Jacobi, he was possessed, and the same day lost them, which came to the Defendants hand, who tertio Octobris, tertio Caroli, converted them to his proper use. The Defendant pleads the Statute of vicesimo primo Jacobi, of limitation of Actions; And that the twentieth of March, decimo nono Jacobi, causa Actionis accrevit; So as not only three years and more are incurred since the Parliament, But also six years, after the conversion before any Action commenced. Et hoc, &c. The Plaintiffs reply, That they were possessed of the said Ship as of their proper goods, and so being possest before the twentieth of March, decimo nono Jacobi, viz. primo Martii, decimo nono Jacobi, They agreed at Londo n aforesaid, in Parochia et Warda prædicta, that the said Defendant, as their servant, should transport the said Ship and Goods to T. in Spain, being parts beyond Seas, and should afterwards restore them unto the Plaintiffs upon request, whereupon the Defendant taking the said Ship, the said primo die Martii, decimonono Jacobi, transported her to the parts beyond Seas, viz. to T. And vicesimo Martii, decimo 7. Jones 252.

decimo nono Jacobi, there ſold the ſaid Ship and Goods to perſons unknown, and converted them to his proper uſe. And that the Defendant after the ſaid converſion, remained in partibus tranſmarinis uſque primum Maii, primo Caroli, By reaſon of which ſtay, they could not ſue him per Legem Terræ: And that primo Maii, primo Caroli, he returned; whereupon the firſt of October, tertio Caroli, apud London, they required him to deliver the ſaid Ship and Goods, which to do he refuſed. But the ſaid Ship and Goods, Ad tunc & ibidem, converted and diſpoſed prout ſuperius continetur; Et hoc, &c. And upon this Replication, the Defendant Demurrs. And now Renden Serjeant moved, that this Action of *Trover* is not within the Statute, but is omitted; For although at the firſt the words be, Actions of Debt, Detinue, Actions upon *Trover*, Account, &c. ſhall be brought within the time after limited, yet in the perclose, Actions *ſur Trover* are not mentioned. But all the Court
Poſt. 333. conceived, although Actions of *Trover* are not mentioned in the perclose; yet the words being, That Actions upon the Caſe ſhall be brought within ſix years; and Actions for words within two years, in thoſe general words of Actions upon the Caſe, the Action of *Trover* is implyed; wherefore it was not allowed. Secondly, Admitting the Defendant was beyond Seas for ſix years after the converſion, and did not return into England, the queſtion was, whether the Plaintiff had not liberty to bring the Action at any time within ſix years after his return? For the Proviſo is on the part of the Plaintiff, if he be over the Sea at the time of the cauſe of Action, that he
Poſt. 334. ſhall have time after his return: And by the ſame equity, it ſhall be ſo where the Defendant is over the Seas, and cannot be ſued. But that point the Court did not reſolve. Thirdly, If this requeſt and non-delivery after his return, be not a new converſion and cauſe of Action, ſo that although he was barred before by the Statute of Limitation, whether he ſhould not be hereby reſtored to that Action? And Jones and Whitlock conceived, that he ſhould, and that it may be well intended, the Goods came to his hands again after his Sale; and the demanding them of him, and his denial and converſion, is good cauſe of Action: But I doubted thereof. Fourthly, It
Ant. 229. was urged, that here the Replication was a departure from the Declaration; For by the Declaration the Plaintiffs ſuppoſe a caſual loſs and a *Trover* by the Defendant, primo Martii, 21 Jacobi. But in the Replication they ſuppoſe an agreement to tranſport the ſaid Ship and Goods, and afterwards to reſtore them to the Plaintiffs, and that the Defendant ſold and converted them to his own proper uſe the twentieth of March, decimo nono Jacobi, and ſo a variation between the Declaration and Replication, in the time and manner how the Defendant had them. Alſo, by his own confeſſion, the converſion was made above ſix years before the Action brought. Reſiduum poſtea, pag. 333.

Soutley

Soutley *versus* Price, Hill. 5 Car. rot. 1276.

APpeal of Murder. Brought by Writ awarded to the Sheriff of Salop, being the next County adjoyning to that of Montgomery in Wales, for murder of her husband at Montgomery, in the County of Montgomery. After Verdict for the Plaintiff, upon Not guilty pleaded, being tryed by a Jury of the County of Salop at the Barr; the murder being foul, and the Defendant found guilty: It was moved in Arrest of Judgment, That this Writ of Appeal ought to have been brought in the County of Montgomery, where the Fact was committed, and not in any other County adjoyning: And it was several times argued at the Barre, by Henden and Berkley Serjeants and Littleton for the Plaintiff; And by Charles Jones, Serjeant Lloyd and others for the Defendant. And after Argument, all the Court resolved, that the Writ should abate: For it is against a fundamental Rule of Law, that a Tryal for Murder by Appeal, or otherwise should be out of the County where it is committed, as 18. Ed. 3. 32. 11. H. 4. 98. & Stamford fol. 9. And for this cause, it was doubted, at the Common Law, where a stroak were given in one County, and death ensued in another County, how it should be tryed? And to avoid this doubt, the Statute of secundo Edvardi sexti 24. was made. But it always was clear, that a Fact in one County ought not to be tryed in another; and although it hath been objected, there would be otherwise fayler of Justice, Because in Wales Breve Domini Regis non currit; And this Appeal is quasi for the King, And where the King is party he may always sue in any County adjoyning: As in Quare impedit, for an Advowson in Wales, because there they cannot write to the Bishop, as undecimo Henrici sexti fol. tertio et sexagesimo primo. Yet it was answered, that Wales was a Realm by it self, and distinct from the Government of England. But afterwards united, and by the Statute of Rutland, appointed by what Laws it shall be governed: And by the Statut. 27. H. 8. cap. 26. & 34. H. 8. cap. 6. divided into Counties, and expresly therein is set down, how Appeals shall be sued there out of Chancery, and ought not not be tryed here by Writs of Appeal. But if he were here in custodia Mareschalli, whether he should be sued here by Bill of Appeal, they would not now resolve? and although it was objected, that writs of appeal have been brought here for Murder committed in Sandwich, which is within the Cinque Ports ubi Breve Domini Regis non currit, the writ supposing the Murder to be committed at Sandwich, in the County of Kent: and the Defendant pleading, that Sandwich was one of the Cinque Ports, upon demurrer, the writ hath been adjudged good. (Note this case was Pasch. 42. Eliz. rot. 256. betwixt Crisp. and Virrall,) and that so it should be here. The Court answered there was a manifest difference betwixt the cases; For there the appeal was brought within the County of Kent, and it was truly

8. Jones 255.

3 Cr. 910.

3 Cr. 910. Yelv. 12.

Post. 253. 4 Inst 223.

truly ſuppoſed done at Sandwich. And the Cinque Ports, though they be a liberty, made by Act of Parliament, yet always remain parcel of the County; and ſo the Appeal well brought: But here by the Plaintiffs own ſhewing, the act was done in another County out of the County of Salop, wherefore the Appeal lies not, and the Court alſo much relyed on this, that no precedent can be ſhewn, where Appeals have been allowed in Counties adjoyning, for Murder committed in Wales: 'Tis true that in viceſimo quarto & viceſimo quinto Elizabethæ, in this Court, A Writ of Appeal was brought againſt one Thomas in the County of Salop, for Murder in the County of Montgomery, ſed nihil inde venit. But divers preſidents were ſhewn to the contrary, viz. one in Trin. 5 Ed. 3. rot. 9. where an appeal was brought here for a fact in Wales, The Judgment was, That for that cauſe eat inde ſine die, And Trin. 18. H. 6. rot. ultimo, an appeal of Rape, was brought here for a fact in Wales, and adjudged, that he ſhall not be put to anſwer, becauſe it was committed in Wales. And two other preſidents were produced, The one Paſc. 10 Ed. 2. rot. 110. The other Paſch. 5 Ed. 4. rot. 34. Whereupon all the Court here reſolved, That this Writ of Appeal lies not, and therefore adjudged for the Defendant. Note the Statute of 26 H. 8. cap. 6. allows, that Endictments may be in Counties next adjoyning; but there is not any mention therein of appeals: And for this reaſon Certioraries have been granted, to remove Endictments out of the grand Seſſions; but never Writs of Appeal.

Poſt. 332.

Lancelot *verſus* Allen, Trin. 3. Car. rot. 1037

9. Hern 189. Jones 251.

TReſpaſs. For entring into an houſe in Saint Olives Hart-ſtreet, upon not guilty, pleaded a ſpecial Verdict was found, That one Cromer being ſeiſed in fee of an houſe in Saint Swithins, and of divers houſes in Saint Olives in London (where the cuſtome being alſo found, that every Citizen or Freeman may deviſe his Lands in Mortmayn) deviſed the Tenement in Saint Swithins to the Parſon of Saint Martins Orgars and his ſucceſſors, to find annually one to ſing Maſs in the Church of Saint Orgars every day, and that there ſhould be paid unto him ten marks by the year: And he deviſed his houſes in Saint Olives, whereof the Land in queſtion, is parcel to his wife for life, to find an anniverſary, and to expend thereupon, divers ſums, amounting to 3 l. 6 s. 8 d. and after her death to the ſaid Parſon and his ſucceſſors finding the ſaid anniverſary: and further appointed to the Churchwardens 6 s. 8 d. for their pains to ſee it obſerved, Et quod ſuperfuerit, over and above the ſaid charges, he wills, ſhall remain in the hands of the Churchwarden of *S. Martins Orgars*, ad manutenendum Capellanum prædictum & ad emendandum & reparand. dictam Eccleſiam de *S. Martins Orgars*, & Ornamenta ejuſdem Eccleſiæ ſecundum eorum diſcretionem: Proviſo ſemper, Quod ſi contigerit prædict. Terras et Tenementa

Poſt. 517. 576. 7. Poſt. 455.

Co. 4. 112.

menta in S. *Swithins* in aliquo casu fore minoris valoris quam decem Marcis, per quod Capellanus prædictus ut prædictum est inveniri non poterit: Tunc volo quod totum quod de prædicta annuali summa de decem Marcis haberi & levari non poterit, haberetur & levaretur de proficuis Tenementorum prædictorum in S. *Olives* by the said Parson and his Successors, ad opus & sustentationem dicti Capellani in perpetuum. And they find, that the Tenements in Saint Swithins at the time of the Will making, and before, were but of the yearly value of 6 l. 5 s. And the Tenements in Saint Olives at the time of the Will, and always after, until the time of the Statute of primo Edvardi sexti, were of the value of 24 l. 10 s. per annum, and that the Priest and the said other uses were imployed and maintained until the making of the said Statute of primo Edvardi sexti, and that the Plaintiff claims as Lessee of the Parson, and the Defendant claims under the Patentee of the King, and whether the Parson of S. Martins Orgars hath title to those Tenements of S. Olives, was the question? And after argument at the Bar, it was held, First, by all the Court, that if this Proviso had not been added, the Lands had been clearly given to the King by the Statute of primo Edvardi sexti, as Lands given for the maintenance of a Priest; For the clause, for those Lands of Saint Olives, was limited, Quod superfuerit after the Anniversary maintained, shall be ad manutenendum Capellanum prædictum & reparandum Ecclesiam & ornamenta ejusdem Ecclesiæ. The superstitious use being certain, and the good use, viz. ad reparandum Ecclesiam et ornamenta ejusdem Ecclesiæ, uncertain. The superstitious use certain shall cause that all shall be given to the King; But Richardson chief Justice, Jones and Whitlock conceived, that by the Proviso, It appears it was his intent, the Priest should have but ten Marks, and what was wanting in the value thereof, should be supplyed out of the Tenements of Saint Olives; so that nothing is given to the Priest, but the ten Marks: therefore the Houses in Saint Olives were not given to the King. But I doubted thereof, conceiving all to be given to the King, for the Proviso doth not alter it; For in the first clause, all the profits of those houses, after the Anniversary paid, is given for the maintenance of a Priest indefinitely, and to the reparation of the Church, &c. And the Proviso doth not abridge it; for that appoints, what is wanting in Saint Swithins shall be made up out of Saint Olives. and so to pay the ten Marks first appointed; so as he shall have the said ten Marks de certo out of both the said Tenements in Saint Swithins and Saint Olives. But that doth not take away the clause, That the residue of the profits of the Tenements in Saint Olives shall be to the Parson, ad sustentationem dicti Capellani. And of this opinion was Hide chief Justice when he lived: But it being moved again in Sir Thomas Richardsons time, he agreeing with Jones and Whitlock in their opinions, it was adjudged for the Plaintiff, That these houses were not given to the King. Co. 4. 111. a. Co. 4. 111. b.

It Ter-

Termino Paſchæ, anno octavo *Caroli* Regis, in Banco Regis.

The King *verſus* Sir James Wingfield, and others.

INformation. By the Kings Atturney againſt Sir James Wingfield, Sir Francis Bodenham, James Bedell, Thomas Brady, John Hambden, and John Neale, for that they had made an Aſſault upon the Sheriff of Middleſex, in ſerving an Execution upon the ſaid Sir James Wingfield, by which means he eſcaped and reſcued himſelf. They all pleaded Not guilty: and now upon the Trial, all beſides Bedell made default, and he appeared: And Noy the Atturney General urged ſtrongly, That it was no reaſon but that the Default of the others ſhould bind him; for it is one intire Suit, and they all have joyned in a Plea, and therefore may not now be ſevered. But all the Court held, Becauſe the Suit was for a criminal offence, although they all pleaded Not guilty, yet it is to every one of them quaſi ſeveral, and the default of one ſhall not be the default of the others; nor the confeſſion of any of them ſhall prejudice the others; Whereupon the Enqueſt was taen by default only againſt the four, which appeared not: And they all were found guilty beſides Bedell, whom the Jury acquitted. And the Kings Atturney now praying Judgment, the Court ſeverally delivered their opinions, and gave Judgment, That Sir James Wingfield, being the principal offendor, ſhould pay 500 l. and Brady 500 Marks, becauſe it appeared upon the evidence, he drew his ſword and wounded the Sheriff grievouſly, and by that means Sir James Wingfeild eſcaped into the ſaid Neals houſe: and againſt the ſaid Neale, becauſe he kept out the Sheriff, ſhutting the door againſt him, and not ſuffering him to ſearch for the priſoner, whereby he eſcaped, 180 l. And againſt Sir Francis Bodenham, becauſe he was the means of conveying away the ſaid priſoner to Lincolns Inn, 500 Marks: and againſt the ſaid John Hambden, becauſe he was aiding with the ſaid Sir Francis Bodenham, 200 l. And it was reſolved, That ſuch fines aſſeſſed in Court by Judgment upon an Information, cannot be afterwards qualified, or mitigated. 1.

Ante 209.

The King *versus* the Major and Commonalty of London.

2. INformation was brought against the Major and Commonalty of London. Whereas they were incorporated by that name, and it was a walled City, and recites the Statute of secundo Edvardi quarti, That the Major for the time, and all who have been Majors, should be Justices of the Peace within the City, and that the Sheriffs are made amongst themselves, and Coroners appointed by themselves; and that by Law they ought to suppress Riots and all unlawful Assemblies: Notwithstanding in June, quarto Caroli, in the day time, that one John Lamb, alias dictus, Doctor Lamb was slain in a tumult, and none of the Offenders taken, nor any person known or indicted for that Felony. And upon this Information, the Major and Commonalty appeared, and confessed the offence, et posuerunt se in gratiam Curiæ, &c. For which they were amerced to 1500 Marks; for it was conceived to be an offence at the Common Law, to suffer such a crime to be committed in a walled Town tempore diurno, and none of the Offenders to be known or indicted. Vid. 3 Ed. 3. Coron. 299. 22 Ed. 3. Coron. 238. 8 Ed. 2. Coron. 425. Stamf. fol. 33. Cok. lib. 7. fol. 7. 3 H. 7. 15. Dy. 210. And Noy Atturney General shewed a [illegible]. 18 Ed. 3. rot. 132. an Endictment of a Town in Devonshire, for suffering an Assembly, as it were to hold Assise in mockery of Justice. And 21 H. 6. a Presentment before Fortescue, against the Town of Norwich, that there was a great Riot in Norwich, and one Gladman took upon him to be King, and went with a Crown of paper in a riotous manner to the Priory of Norwich, &c. and although it appears not upon the Roll Quid inde venit, yet per rot. Patent. 27 H. 6. memb. 13. their Liberties for that cause were seised, and regranted.

Tyndals Case.

3. A Certiorari was awarded to the Major of Hithe and the Jurats there, being one of the Cinque Ports, to remove an Endictment of Felony (viz. Buggery) against one Tyndall, supposed to be committed there: The Writ was not returned, upon pretence of a liberty or privilege belonging to the Cinque Ports, That the Kings Writ out of any of his Courts shall not be awarded unto them, but ought to be directed To the Lord Warden of the Cinque Ports, who ought to make the Warrant unto them to execute it: And because the Writ was brought unto them, and no Warrant from the Warden, they would not return it: Whereupon an Alias Certiorari being awarded, and delivered to the Major and Jurats in Court upon Oath made, that they said, they would not return it; and for that they imprisoned the Messenger who brought it, in their Common Gaol; and that one Knight a Jurate spake contemptuously of the Writ

1 Rol. 395. Post. 264, 265.

Post. 291.

4 Inst. 223. 2 Cr. 543.

writ being under green wax (the Seal of the Court) saying, This is no time for green Plums. Upon these Contempts proved by several Oaths, an Attachment was prayed against them and awarded: And now Noy the Kings Attorney being in Court, said, That for this Contempt he would exhibite an Information: For such contempts against the Kings Messenger who brought the Kings writ, are contempts against the Kings person, and such contempts ought to be severely punished; For it is termed, Dimicare contra Regem et non disceptare: and he shewed a Record in Court, 33 Ed. 1. rot. 101. where the Bishop of Durham pretended he had such privileges that the Kings writ ought not to run there; because one brought the Kings writ thither, imprisoned him: and for this cause an Information being exhibited against him, and the offence proved, It was adjudged he should pay a Fine to the King, Et quod Capiatur, and should lose his liberties for his time: And the entry in the Roll is, that he shall lose his liberties, because Justum est quod in eo quod peccat, in eo puniatur; And he shewed another president, Trin. 21 Ed. 3. rot. 46. or 460. where in the Common Bench a Prohibition was awarded to the Bishop of Norwich, and he excommunicated the party who brought the writ, & thereupon the party brought his Action upon the Case, and declares all this matter, and he being found guilty, it was adjudged, That his Temporalities should be seised until he absolved the party, and satisfied the King for that contempt, and that the party should recover against him for damages ten thousand pounds; and upon that Judgment the Bishop brought a writ of Error in the Kings Bench, and this Judgment was affirmed. And thereupon the Attorney General moved for the King, That in this Case a new writ might be awarded, and they to make a return thereupon, as they shall be advised. And it was said, although in civil Pleas they have such Jurisdiction (for their Court is ancient, time whereof, &c. and confirmed by Act of Parliament) yet it cannot extend to what they do as Justices of Peace, which begun within time of memory: and that the Statute of Magna Charta cap. 9. and Articul. super Chart. cap. 7. are only, That they shall have consuetudines suas, &c. and that cannot be extended to matters of the Crown, with which they meddle as Commissioners of the Peace or *Oyer* and *Terminer*, which are all subject to the Jurisdiction of this Court.

R. 406.

Ante 247.

2 Cr. 543.

In Mich. 8 Car. a Certiorari was prayed to be awarded to the Major and Justices of Dover, being within the Cinque Ports, to remove an Endictment of Felony against one Ringden of Dover, who was endicted there of Buggery. Henden Serjeant moved, That this should be awarded, and directed To the Lord Warden of the Cinque Ports, as other Process is usually directed. But upon debate all the Court agreed, That it should be immediately directed to the Justices before whom the Endictment was; For they held Plea of it as Justices of the

Post. 264.

the Peace by virtue of their Commissions, and not by their ancient Charters or Prescription, which was awarded accordingly.

Rhemes *versus* Humphreys and his Wife, Hill. 7 Car. rot. 1202.

4. Jones 264. 1 Rol. 348. Post. 495. 1 Rol. 348. 2 Cr. 661. R. 226. 2 Cr. 5. Yelv. 166. 1 Rol. 12. 93. 24. Hob.

A *Ction sur Trover & Conversion* of Goods by *Baron* and *Feme*, ad usum ipsorum. They pleaded Not guilty, and both were found guilty, and damages assessed, and now moved in arrest of Judgment, That the Action lies not against the *Baron* and *Feme* jointly for conversion to their uses during the Coverture: For when they joyn, it is the act of the *Baron* only, and the *Feme* cannot convert to her own use; but an Action of *Trover* well lies for conversion by the *Feme* before the Coverture, or by the *Feme* only during the Coverture; For she may do a *Tort* solely, and the *Baron* shall be sued with her, but not where she joyns with the *Baron*; wherefore the Court would advise thereof. And afterward, Trin. 8 Car. it was adjudged for the Defendants, 38 Ed. 3. 1, 13 Ric. 2. brev. 644.

Boulton *versus* Banks, Hill. 7 Car. rot. 276.

5. Post. 487.

Action upon the Case. Whereas the Defendant kept a Mastiff, sciens that he was assuetus ad mordendum Porcos, and that the Plaintiff was possessed of a Sow great with Pigs, that the said Mastiff bit the said Sow so as she died of the biting. After Verdict upon Not guilty pleaded, it was moved in arrest of Judgment, First, That the recital of the Bill is in placito Transgressionis, and the Declaration is in placito Transgressionis super casum, sed non allocatur. The second Exception, That to declare of a Dog ad mordendum Porcos assuetus is not good, for it is proper for a Dog to hunt Hogs out of the ground, and his biting of the Hogs is necessary, and not like to the keeping of a Dog which usually bites Sheep or other Cattel. But the Court (absente Richardson) conceived the Action well lies; for it is not lawful to keep Dogs to bite and kill Swine; wherefore it was adjudged for the Plaintiff.

Jesson *versus* Laxon, Trin. 7 Car. rot. 258.

6. 1 Rol. 484. 2 Cr. 314. 2 Cr. 307. 2 Cr. 571.

Error. Of a Judgment in Coventry. The Error assigned was, Because the Judgment being by a Nihil dicit in debt, was discontinued; for the continuance was taken until the next Court, which is uncertain; for it ought to be to a day certain, as 9 Eliz. Dyer 262. But it was answered, That in Coventry there is no day certain for the keeping of their Courts; for some times it is held within a fortnight, sometimes within three weeks; and Jones said, all the proceedings in Wales are adjourned until the next great Sessions, and none knows when the great Sessions shall be

be held. And this Error was assigned and over-ruled in the case betwixt Bythell and Parry; and so Richardson, Jones, and Whitlock, conceived it should be here: But I doubted thereof, The Judgment was affirmed. 1 Rol. 484.

Mounson *versus* Cleyton.

SCire Facias. To have Execution upon a Judgment in Debt: The Defendant pleads, that at another time before, the Plaintiff had sued a Capias ad satisfaciendum, and that the Defendant was arrested, and in Execution thereupon, and demands Judgment, &c. The Plaintiff replies, true it is, such a writ of Capias ad satisfaciendum issued, and that the Defendant was arrested thereupon, and made rescous, and escaped: Therefore he sued this Scire Facias to have Execution, being after the year and day. Upon this the Defendant demurred, pretending because the Plaintiff had confessed the Defendant was once in Execution, he could not afterward take a new Execution. But the Court resolved, Scire Facias was well maintainable; for when he had not the benefit of his Execution, it was as none, and the Defendant shall never take advantage of his own wrong by his escape. And peradventure the Sheriff is dead; so the Plaintiff hath not any remedy against him, whereupon it was adjudged for the Plaintiff, That he should have Execution. 7. 1 Rol. 901. Ante 240. R. 34. Ante 75, 420. 1 Rol. 901.

Termino

Termino Trinitatis, anno octavo *Caroli* Regis, in Banco Regis.

Butler *versus* the Preſident of the Colledge of Phyſicians, Paſch. 7 Car. rot. 519.

1. Jones 261. 2 Bul. 185. ERror of a Judgment upon a Demurrer in the Common Bench. The firſt Error aſſigned was, Becauſe the Record was Ad reſpondendum Domino Regi & Preſidenti Collegij, &c. Qui tam pro Domino Rege, quam pro ſeipſo ſequitur quod reddat eis ſexaginta libras; unde idem Preſidens qui tam, &c. dicit, &c. Whereas the the Action ought to have been brought by the Preſident only qui tam &c. and not by the King and Preſident, &c. ſed non allocatur; For being an original writ, the writ is moſt often ſo, and ſometimes the other way: And they conceived it good both ways. But Informations are always, that the party qui tam for the King quam pro ſeipſo ſequitur, *&c.* Vide Plowd. 77. new Book of Entries 160. old Book of Entries 143, 373. The ſecond Error was, that the Replication was a departure from the Count; For the Count ſets forth, that King Henry the eighth anno decimo Regni ſui incorporavit (*& per le Statute* of decimo quarto Henrici octavi confirmavit) the Colledge of Phyſitians by the name of the Preſident, *&c.* that no man ſhould practiſe Phyſick in *London*, or within ſeven miles, without Licence under the Seal of the Colledge, upon the penalty of 5 l. for every month that he ſo practiſed, the one moity unto the King, the other unto the Preſident of the Colledge, to the uſe of the ſaid Colledge, And for that the Defendant not being allowed, &c. had practiſed Phyſick for twelve months in London. The ſaid Action was brought, &c. The Defendant pleads the Statute of triceſimo quarto Henrici octavi, cap. 8. That every one who hath Science and Experience of the nature of Herbs, Roots, and Waters, or of the operation of the ſame by ſpeculation or practice, may miniſter or apply in and to any outward Sore, Uncome, Wound, Apoſthumations, outward Swelling, or Diſeaſe; any Herb, Oyntments, Baths, Paltes or Implaiſters, according to their cunning, experience, and knowledge, *&c.* or drink for the Stone and Strangury or Agues in any part of the Realm, without ſuit, vexation, *&c.* any Act or Statute to the contrary notwithſtanding. And that he having ſkill in the nature of Herbs, Roots, and Waters by ſpeculation and practice, applyed to perſons requiring his skill, Herbs, Oyntments, Baths, Drinks, &c. to their Sores, Uncomes, Wounds, and for the Stone and Strangury or Agues, and to all other diſ-

Moor 64.

2. Moor 64. Dyer 227. b. Poſt. 336.

eaſes

cases in the said Statute mentioned, prout ei bene licuit. Et, quoad aliquam aliam practisationem seu facultatem medicinæ aliter vel alio modo, quod non est culpabilis. Et de hoc ponit, &c. And makes his averment. Et hoc paratus est verificare, The Plaintiff replies and shews the Statute of primo Mariæ capite nono, which confirms the Charter of decimo Henrici octavi, and the Statute of decimo quarto Henrici octavi and appoints that it shall be in force notwithstanding any Statute or Ordinance to the contrary. And upon this it was demurred, because it is a departure; for it intitles him by another Act, viz. the Statute of primo Mariæ, which is not mentioned in the Court: And therefore it was assigned for Error. But all the Court here conceived. That it is no departure, Because it fortifies the Count, and is as to revive the Statute of decimo quarto Henrici octavi, if it were repealed in this particular by the Statute of tricesimo quarto Henrici octavi: And for that the Case of Woodhead was shewn to the Court, Mich. 42 & 43 Eliz. rot. 397. where the President of the College of All-Souls brings an Action upon the Case for taking Toll in , and shews a Charter of vicesimo sexto Henrici sexti to be discharged of Toll, the Defendant pleaded the Act of Resumption of Liberties granted by Henry the sixth, made , and so the Liberty gone. The Plaintiff pleaded a reviver of them by the Statute of quarto Henrici septimi: And it was held to be no departure; But as it were a confession and avoiding. The third and principal Error assigned was, if the Statute of tricesimo quarto Henrici octavi, be not repealed by the Statute of primo Mariæ, and if not, Whether the Defendant hath made a sufficient justification: And Quoad hoc, Whether the said Statute be repealed, the Court was not resolved, But Richardson chief Justice conceived it was repealed by primo Mariæ by the general words, any Act or Statute to the contrary, of the Act of decimo quarto Henrici octavi, notwithstanding. But I conceived, that the Act of tricesimo quarto Henrici octavi, not mentioning the Statute of decimo quarto Henrici octavi, was for Physitians; but the part of the Act of tricesimo quarto Henrici octavi, was concerning Chirurgions and their applying outward Medicines to outward Sores and Diseases: And Drinks only for the Stone, Strangullion and Ague; That Statute was never intended to be taken away by the Act of primo Mariæ. But to this point Jones and Whitlock, would not deliver their opinions. But admitting the Statute of tricesimo quarto Henrici octavi, be in force, yet they all resolved, the Defendants Plea was naught, and not warranted by the Statute; for he pleads, That he applyed and ministred Medicines, Plaisters, Drinks, Ulceribus, Morbis, et Maladiis, Calculo, Strangurio, Febribus, et aliis in Statuto mentionatis; So he leaves out the principal word in the Statute (Externis.) And doth not referre and shew, that he ministred potions for the Stone, Strangullion or Ague, as the Statute appoints to these three diseases only, and to no other. And by his Plea his

2 Cr. 121. Co. Lit. 304. a. Pl. Com. 105. b Post. 334.

Yet. 13. 2 Rol. 198.

2 Cr. 121.

potions may be ministred to any other sickness; wherefore they all held his Plea was nought for this cause, and that Judgment was well given against him; whereupon Judgment was affirmed.

Walker *versus* Sir John Lamb. Trin 7 Car. rot. 374.

2. Jones 263. ACtion upon the Case. For disturbance of the Plaintiff in exercising his Offices of the Officialty of the Archdeaconry of Leicester, granted by the Archdeacon of Leicester, and of the Office of Commissary of the Bishop of Lincoln. Upon Not guilty pleaded a special Verdict was found, that these were ancient Offices, the one granted by the Archdeacon of Leicester, the other by the Bishop of Lincoln, and were Offices of Judicature always granted to one person for life, until 1609. and in anno tricesimo Elizabethæ, were so granted to Doctor Chippendale, and after, in 1609. those Offices were granted to Doctor Chippendale and to one Edward Clerk for their lives, no surrender being actually made by Doctor Chippendale; afterward, 1614. both Offices were granted, the one by the Arch-Deacon, the other by the Bishop to Sir John Lamb and to the said Edward Clerk; and those Grants confirmed by the Dean and Chapter; That in anno 1622. Doctor Chippendale died, and afterwards the Arch-Deacon who granted that Office, and the Bishop who granted the Office of Commissary, died, and the Bishop of Lincoln who now is, and the now Arch-Deacon by several Patents granted those Offices to the Plaintiff, who was at the time of the Grant of the Patent a Lay person, and Batchelor of the Civil Law only: And they find the Statute of tricesimo septimo Henrici octavi, capite decimo septimo, that Lay persons married or unmarried, being Doctors of the Civil Law, may be Commissaries, Officials, Scribes or Registers; and that the Plaintiff exercised those Offices, and the Defendant disturbed him, Et si super, &c. Upon this, the matter being argued at the Barr, was reduced only to two questions; First, Whether the Patent to the Plaintiff, being a Lay person and not a Doctor of the Law, were good, or restrained by the Statute of tricesimo septimo Henrici octavi? And as to that point, all the Court conceived, The Grant was good; for the Statute doth not restrain any such Grant: And it is but an affirmance of the Common Law, where it was doubted if a lay or married person might have such Offices; and to avoid such doubts, this Statute was made, which explains, that such Grants were good enough; and it is but an affirmative Statute, and there is no restriction therein: And although the Statute saith, that Doctors of the Law, (though Lay persons or married) shall have such Offices, yet that is not any restriction, That none others should have them but Doctors of the Law; and the Statute mentions as well Registers and Scribes as Commissaries, and that a Doctor of the Law shall have them; yet in common experience such persons as are meerly Lay and not Doctors have

have had such Offices: And upon this very point was a Case in this Court, Hill. 35 Eliz. rot. 181. between Pratt and Stock, where, upon demurrer, this Statute was pleaded against the Plaintiff to whom the Commissaryship was granted, being but a Batchelor of Law, and he having granted administration, the Grant was adjudged good, and the Book of Entries, 484. and 489. was allowed good; wherefore they resolved the Grant was well enough. And it was also resolved, that where an Officer for life accepts of another Grant of the same Office to him and to another, it is not any surrender of the first Grant. The second point was, Whether the Office of the Officialty of the Archdeaconry, and the Office of the Commissary of the Bishop, be grantable by the Statutes of primo Elizabethæ, & decimo tertio Elizabethæ, because it was pretended, they were not parcel of the possessions of the Bishoprick or Archdeaconry, so as they could have any profits by them, and then the Statute doth not restrain the Grants of them? But all the Court resolved, they were within the words and intent of the Statutes; for they be Hereditaments, and are pertaining unto them; and that a Grant of those Offices to two, where they were only grantable to one for life, and being granted in reversion, is a void Grant by the Statutes against the Successors; for the Statutes restrain all Grants of any thing to be avoidable against the Successor, besides Grants of necessity, and Leases for three lives or one and twenty years, where the ancient Rent is reserved: And all other Grants, as well of Offices as of other things, not warranted by the Statutes; are made void as against the Successors. Vid. Coke 10. fol. 60. the Bishop of Salisburyes Case, Cok. 5. fol. 14. and a Case betwixt Vaughan and Crompton 14 Jac. at the Assises before the Justices of Assise for the Office of the Registership in Suff. and between Johns & Powell for the Registers place of Hereford, where it was adjudged, that such Offices granted in Reversion were void: Whereupon Rule was given, That Judgment should be entred for the Plaintiff, unless other cause were shewn. And afterward being moved again, Judgment was given for the Plaintiff.

3 Cr. 315.

Ante 198.

3 Cr. 637.
Ante 49.
Post. 557.

2 Vent. 188

Tredymmock *versus* Perryman. Mich. 7 Car. rot. 76.

ERror of a Judgment in Cornwall, in Debt upon an Obligation. The Error assigned was, because the Tryal of the Issue joyned there, was by six Jurates only. Rolls for the Defendant moved, That it is not Error; For it is returned, that he tried it there by six secundum consuetudinem ibidem à tempore, &c. before used; And the Court being by prescription, the Tryal then by the custome may be by six; and there be multitude of Records in twenty several Courts in Cornwall, where Tryals may be by six, by customes there used; wherefore, if it should be reversed, many others should be reversed. But all the Court held, that such a custome

3. 1 Rol. 564.

1 Rol. 564.

R. 99.

is void, and against the Common Law, and there cannot be an exemption of persons from being Jurors, unless there be sufficient Jurors besides the persons exempted to make tryals: And Jones said, although in some parts of Wales there be such Tryals by six only, it is by reason of an Act of Parliament of tricesimo quarto Henrici octavi, which appoints, that such Tryals may be by six only, where the custome hath been so, which proves that when they were united to England, and to be governed by the Laws here, such Tryals could not be, unless they had been so provided for by Parliament; whereupon the Judgment was here reversed.

Major *versus* Brandwood. Hill. 5 Car. rot 643.

4. Jones 300.

REplevin. Of an Ore taken, &c. The Defendant makes conusance as Bayliff of John Brandwood, for that he was seised in fee of the Mannor of D. and that one Smith was seised in fee of such a Tenement holden of the said Mannor by Rent and Hariot service, payable after the death of the Tenant, and that Smith died possessed de Animalibus & Cattallis; And because the Hariot was not paid, he by the command of the said John Brandwood distrained, and so made Conusance; and the Issue was upon the Tenure, and found for the Defendant: And now exception was taken in arrest of Judgment, because he doth not shew what was the best beast, which he demanded, nor the kind thereof, nor the price of it: For this cause Hyde moved, that the Avowry was ill, for it is uncertain what thing the Defendant should have, or how he shall be satisfied if he should have Retourn. And he said, all the presidents are in point, that he ought to shew what the Hariot is, when he demands the price thereof. Vid. Coke 8. fol. 103. Talborts Case Plo. 94. eid. the Book of Entries 584. But Hutchinson said, when the Lord distrains, it is because the Hariot is eloigned, and therefore he cannot seise it; so then he cannot shew what is the best beast. And for an Hariot service it is at the Lords election either to distrain, or to seise it, if he can find it; yet seise he cannot, unless the proper beast of the Tenant only; but he may distrain any mans beasts: which are upon the land, and retain them untill the Hariot be satisfied. And he said there were diders presidents in the Common Bench, where he avowes without shewing what was the best beast, or any price thereof: And it would be inconvenient to enforce the Avowant to shew it, for peradventure he doth not know, or ever saw it. Vid. 24 Ed. 3. 72. 44. Ed. 3. 13. And afterwards it was adjudged for the Avowant.

Pl. Com. 566. 3 Cr. 590.

This Case was moved again, Mich. 8. Car. by Germin, That the Avowry was not well made, Because it doth not appear what beast he should have for the Hariot, nor of what value, the Retourn being irreplevisable: Nor can the Plaintiff know what to offer, to have again his Cattle. But all the four Justices present, agreed, that the

the Avowry is good enough; for peradventure the Advowant doth not know what was the beſt beaſt, and the Plaintiff having done wrong by his eloignment, he at his peril ought to tender ſufficient recompence: And that the Avowry was good, there were ſhewn two preſidents, the one Trin. 18 Eliz. rot. 506. betwixt Dicker and Higgens; The other Trin. 13 Jac. rot. 1148. Jones 300.

Hixe *verſus* Hollingſhed. Hill. 7. Car. rot. 765. Ant. 229.

5.

ERror of a Judgment in the Common Bench, in an Action upon the Caſe for words. She is a Bawd and hath bewitched him by Witchcraft and Sorcery. Germin for the Plaintiff in the Writ of Error moved, that theſe words be not Actionable; For to call one Bawd no Action lies at the Common Law: But to ſay that ſhe keeps a houſe of Bawdry is Actionable at the Common Law And that the Judgment paſſed ſub ſilentio in the Common Bench. But it was held, by Jones and my ſelf, that the Action well lies for the laſt words, And hath Bewitched him, &c. But for the firſt words 'twas doubted; wherefore, cæteris abſentibus, a rule was given, that Judgment ſhould be affirmed. 1 Rol. 44. 45. 1 Rol. 44. Ante 229. 1 Rol. 45. Poſt. 324

Mead *verſus* Perkins.

6.

ERror of a Judgment in the Common Bench, in an Action for words: Where the Plaintiff Perkins declared, that he was an Atturney of the Common Bench, and of the Sheriffs Court in London: And that the Defendant ſpake theſe ſcandalous words of the Plaintiff, He (prefatum *le* Plaintiff innuendo) is a couſener, and couſens his Clients in the Sheriffs Court of *London* and was for that cauſe diſcharged of that Court. The Defendant pleaded Not guilty, and found againſt him, and Judgment: And the Error aſſigned; That the words be not actionable. But the Court held they were ſcandalous, and touched him in his profeſſion; and Judgment was affirmed. 2 Cr. 586.

Ellis *verſus* Johnſon. Trin. 7. Car. rot. 1039.

7.

ERror of a Judgment in D. an inferiour Court. The Error aſſigned, Becauſe after an Habeas Corpus cum cauſa, was ſued out of this Court, and delivered to the Major and principal Officer of that Court, and acceptance and allowance thereof, they notwithſtanding proceeded to Tryal and Judgment. The Defendant pleaded in nullo eſt erratum. And now Germin moved, that this is not error, becauſe he doth not allege the Habeas Corpus to be upon Record; ſo as the error now aſſigned is not tryable. But it was held, That that proceeding after the Habeas Corpus delivered 2 Ro. 493. 2 Cr. 43. 3 Cr. 33. Co. 8. 145.

is

is an Error, and coram non Judice, which is confessed by the pleading in nullo est erratum: And if it were not true that it was delivered to the Major and allowed, it ought to have been denyed, and is tryable *per pais*; but because it is not denyed, it is a manifest error; whereupon the Judgment was reversed.

Wilson *versus* Chambers.

8. 1 Rol. 5. 3 Cr. 723. ERror of a Judgment in the Common Bench. Upon *Trover & Conversion* of a Bond of 100 l. conditioned for the payment of 50 l. at such a day, which came to the Defendants hands, and he being required such a day and year to deliver it, had not delivered it; but refused and converted it to his own use (but no day, year or place, of this Conversion mentioned.) The Defendant pleaded Not guilty, & found against him, and Judgment for the Plaintiff. The first Error assigned by Master Grimston was, Because no date of the Bond is mentioned, sed non allocatur; for being lost and converted, he peradventure did not know the certain date of the Bond, and if he should recite a date and misrecite it, it would be a Fayler of his Suit. The second Error, Because he did not allege the day nor place of the Conversion, sed non allocatur; For the denying to deliver it upon request is a Conversion, and the day, year, and place are thereby alledged, which is sufficient; And the Allegation of the Conversion (which hath no day nor place) is not material, when there was a sufficient Conversion before. Whereupon the Judgment was affirmed.

2 Cr. 638. 3 Cr. 98. Co. 10. 56. Post. 535.

Kiffin *versus* Vaughan and his Wife, Trin. 6. Car. rot. 571.

9. ERror of a Judgment at the grand Sessions in the County of *Montgomery* in a Quod ei deforceat, in nature of a Writ of Right. The Defendant saith, that he hath majus jus than the Plaintiff, and Issue thereupon; and at the day the Defendant made default, and petit Cape awarded, and at the day of the petit Cape returned Edward ap Thomas prayed to be received; because the feoffment was made to the use of the said Vaughan and his wife, for the life of the wife. The remainder to the said Edward ap Thomas and his Heirs. The Demandant counterpleads that Receipt, Traversing the feoffment, and Issue joyned thereupon, and at the day of return of the Jury, Edward ap Thomas did not appear, but one John ap Edwards as his Son and Heir, prayed to be received by his Guardian, he being within age, and said, that his Father was dead, and he as Son and Heir appeared, and pleaded the same Plea, as his Father pleaded, & prays *que le parol demurrer pur son nonage*, the Plaintiff counterpleads his receipt, taking Issue upon the feoffment ut antea, and upon that, they were at Issue, and at the day, the Tenant by receipt made default, and a petit Cape awarded, & at the day he did not save his default; whereupon Judgment was against the Tenant by receipt, and Error brought, The first Error assigned was, Because the Counterplea was of the feoffment alledged, where he

he ought to have said of the Reversion, and he cannot Traverse the feoffment; But quocunque modo the Reversion. And although he hath it not by feoffment, yet if he hath it by any other way, that sufficeth. The second Error was, Because the receipt is admitted, after receipt, which ought not to be, unless in case where the Tenant by receipt dyes, and his Heir comes in loco suo. The third Error was, Because the Judgment was given upon the default of the Tenant by receipt, against the Tenant by receipt, where the Judgment ought to be always, against the tenant to the Action, and this was held a manifest Error; whereupon the Judgment was reversed. 2 Cr. 688.

Abraham Jennings Plaintiff *versus* Vandeputt and others

DEbt upon an Arbitriment to deliver 75 l. And declares that the Plaintiff and Defendants submitted themselves to the Arbitriment of four Merchants, concerning certain Accounts of Pilchers; so as the Arbitriment be made and delivered in writing, before the twentieth of July following: And if they could not agree: then to the Arbitriment of such an Umpire as the Arbitrators should name; so as he made his Umpirage in writing before the five and twentieth of July following. And shews that the four Arbitrators did not make any Arbitriment, ad vel ante the twentieth of July following; but that before the twentieth of July, viz. the eighteenth of July, three of them, and the fourth Arbitrator agreeing thereunto upon the one and and twenteth of July, by their writing dated the eighteenth of July, nominated Abraham Chamberlaine for Umpire, who took the charge upon him, and before the twenty fifth of July made an award super premissis, viz. That the Defendants should pay the said 75 l. within a month, &c. And for non-payment, this Action was brought: And upon nil debet, found for the Plaintiff, and after Verdict moved by Grimston in arrest of Judgment, that this nomination of the Umpire before the twentieth of July, (at which time they were to make their award) was not good. For they had all that time to make their award, and no time then appointed for to nominate an Umpire, untill after the twentieth of July, sed non allocatur; For there is no compleat nomination until the agreement of the fourth Arbitrator with the other three, viz. the one and twentieth of July, and the writing is not to have effect until that time. And it is no writing by intendment until sealed, although it be dated before. And if they had nominated the Umpire before the time expired of making their Arbitriment, yet it is good enough, when no Arbitriment is made by them within the time; whereupon it was adjudged for the Plaintiff. 10. R. 65. 515.

Watts

Watts *versus* Baker.

11. 1 Rol 538. TRnſpaſs quare clauſum fregit. The Defendant pleads according to the Statute of vicesimo primo Jacobi, that he tendred amends before the Action brought, viz. the second of October ſeptimo Caroli. The Plaintiff replies, that before ſuch tender, he ſued a Latitat, Teſte the laſt day of Trinity Term before, and upon that procured the Defendant to be arreſted, intending to declare in Treſpaſs; It was thereupon demurred, and reſolved, that this Tender came too late: For as well as a Tender after an original Writ, comes too late; ſo after an Arreſt upon a Latitat: For the Tender by the Statute is intended to be immediately after the Treſpaſs, and before any Suit commenced; Wherefore it was adjudged for the Plaintiff. 1 Rol. 538.

12. 1 Ro. 636. 656. Noy 108. 1 Rol. 636. A Prohibition was prayed by Calthrop. To ſtay a Suit upon an Appeal here to the Delegates from a ſentence in Ireland; For Tythes of Fiſh taken in the Sea. Becauſe Fiſh in the Sea or great Rivers are feræ naturæ, and not Tythable. Secondly, Becauſe the Sea is not within any Pariſh: So as no ſpiritual Perſon can ſay it is within his Pariſh, where the Fiſh is taken. But the Prohibition was denyed; For Tythes of Fiſhes are uſually paid in Ireland, as Jones affirmed. And it was ſaid in Cornwall, they pay Tythes for fiſhing in the Sea, to the Parſon of the Pariſh where they are landed: And it is a cuſtome in Yarmouth, that Tythes ſhall be paid for Herrings. Poſt. 339. 1 Rol. 636.

Hopeſtill Tyldens Caſe. Ante pag. 252.

13. 1 Ro. 395. A Certiorari being awarded, to the Major and Jurates of Hithe, to remove an Endictment taken there againſt Hopeſtill Tilden, who was Endicted before them for Buggery: They returned upon the Writ, that it is one of the Cinque Ports: And that they have a privileage there, and of time whereof, &c. That no Writ out of the Kings Courts runs there; But it muſt be directed to the Warden of the five Ports who ſhould ſend them, and then they were returned, and not otherwiſe. And it was moved, That this is an ill return, and that they had not any ſuch liberty; For they may not meddle with matters of the Crown, becauſe it is ſaved in Magna Charta; Whereupon it was prayed, That it might be diſallowed, and that a Pluries Certiorari might be awarded againſt them, commanding them to certifie the Endictment at ſuch a day, and then to be in perſon to ſhew their Charters and 2 Cr. 543.

evidence

evidence for their pretended claims, and to answer their contempt, in not returning the Record upon the first Writ: And Noy the Kings Atturney shewed a Record, Pasch. 43 Ed. 3. rot. 19. out of the Treasury of the Exchequer. A Writ being awarded out of the Chancery, To the Major and Commonalty of London, to certifie an Endictment there taken against one Lumbard for ingrossing of Silk, upon the Alias they made such return, That by ancient Charters confirmed by Parliament and ancient usage, they had such a priviledge, That all Endictments and procedings for any cause unless for Felony, should be tried and determined there, and not elsewhere: And hereupon a Pluries was awarded to return this Endictment into Chancery, and that they should be there at the same day to shew their Evidence and Charters to maintain their claim, and to answer their contempt: And at the same day they returned all their evidence and procedings there. And so it was prayed, That such course should be observed here: And the Court awarded accordingly a Pluries Cerciorari directed to the Major and Jurats. Post. 291.

Goodyear *versus* Bishop.

ACtion for words. Whereas the Plaintiff is, and for divers years hath been a Merchant, and used the Trade of a Merchant, that the Defendant having communication with one Harris of the Plaintiff, to scandalize him, and deprive him of his means of living, said of the Plaintiff these scandalous words, He (innuendo the Plaintiff) is not worth a groat, he is 100 l. worse than nought. After Verdict for the Plaintiff in London, and one hundred Marks damages given, It was moved in arrest of Judgment, that these words be not actionable; for he doth not shew, that he spake of him as in relation to his profession, nor called him Bankrupt. But all the Court held, That these words of a Merchant who lives upon his credit, which is the principal means of his gains, be very scandalous, and *tant amount* as if he had called him Bankrupt; wherefore it was adjudged for the Plaintiff. 14.

Johnson *versus* Sir Henry Rowe.

PRohibition. For that the Prior of the Salutation of the order of the Carthusians was seised in fee of an House and Grange, called Bloomsbury in the Parish of Saint Giles, and of such Lands in the tenure of the Plaintiff: And that he and all his predecessors, until the day of the dissolution held them discharged of Tythes. And so seised, vicesimo nono Henrici octavi, surrendred them to the King, 15.

and pleads the Statute de triceſimo primo Henrici octavi, and conveys the intereſt from the King to the Plaintiff, &c. The Defendant pleads, That primo Maij 1422. it was agreed betwixt the Maſter of the Hoſpital of Burton Lazers and the ſaid Prior, That when the Lands of the Manor of Bloomsbury were in the hands of the Tenants or Fermers of the Prior, that Tythes ſhould be paid: And when the Lands ſhould be in the hands of the Prior himſelf, that they ſhould not pay Tythes; but then they ſhould have ſix Kine-gate, in ſuch a Paſture of &c. in lieu of the Tythes, and conveys the poſſeſſion of the Hoſpital to the King by ſurrender, and from the King to the Defendant, and Traverſeth That the Plaintiff now holds the Lands diſcharged of Tythes, &c. whereupon the Plaintiff demurs, and it was adjudged for him, that the Plea is ill, and no good inducement to the Travers; for he makes no title to the Maſter of the Hoſpital for Tythes, but only pretends an agreement, but doth not intitle him to the Tythes, nor ſhews that he was ſeiſed of them in fee, nor doth ſhew any thing for
R. 541. which they might make ſuch an agreement; alſo he doth not ſhew the agreement to be by writing, and the inducement of a Travers
Poſt. 336. ought to be always ſufficient; Whereupon it was adjudged for the Plaintiff.

The King *verſus* Warde and Lyme.

16. INformation. Whereas there was from the time whereof, &c. a common High-way in Cold-Aſhby, in a Lane called Cricklane, leading to divers Market-Towns, as well for Horſe-men as for Foot-men, and for Carriages, That the Defendants, the firſt of June, ſeptimo Caroli, with hedges and ditches erected croſs the Lane, incloſed and ſtopped the ſaid way, and held it incloſed and ſtopped, whereby, &c. the Defendants confeſs that there was ſuch a common High-way prout in the Information, and that they incloſed and ſtopped it. But they ſaid that the ſaid way was ſo foul, and ſurrounded with water and dirt, that Paſſengers could not paſs there without great danger. And that before the ſtopping of the Lane, viz. the thirtieth of May, ſeptimo Caroli, for the profit and eaſe of the Paſſengers, one Carew Sands, being ſeiſed in fee of a Cloſe adjoyning to the ſaid Lane, laid out another way more commodious for the Kings people there to paſs, and before the laying out of that way, viz. decimo octavo Maij ſeptimo Caroli, a Writ of ad quod Damnum iſſued to enquire, whether it were to the damage, &c. if the King ſhould grant ſuch licence to the Defendants to ſtop the ſaid way? And thereupon an Enquiſition was taken triceſimo primo Maij, ſeptimo Caroli, That it was not to the damage, &c. if the King ſhould grant ſuch licence, &c. For that another way is laid out as beneficial for the people, abſque hoc, That

That they inclosed and stopped it with hedges, &c. ad commune nocumentum, &c. Upon this the Kings Atturney demurred. And now it was moved, That this Plea was ill in matter and form, because the allegation that Carew Sands laid out another way more beneficial for the Kings people, not appearing by what Authority he did it, is not good; for it is but at his pleasure, and he may stop it when he will; and by the laying out, the Subjects have not such interest therein, so as they may justifie their going there; nor is it any such way, that the Inhabitants are bound to watch there, or to make amends if any robbery be there committed, nor is any person liable to repair and maintain it; also the pleading the issuing of the ad quod Damnum, and the Enquisition thereupon, is to no purpose, when he doth not plead, that he obtained licence; for that is only on purpose to inable him to obtain licence, and therefore the Plea is ill. Vid. Register 253. et 255. Another exception was taken, Because the Travers is ill, That he did not inclose ad nocumentum, &c. wherefore and for these reasons the Court held the Plea ill, and gave rule for Judgment.

Termino Michaelis, anno octavo *Caroli* Regis, in Banco Regis.

1. *Memorandum.* In the Vacation Sir *James Whitlock*, one of the Justices of the Kings Bench, died in his house at *Fauly* in the County of *Bucks*, and Sir *Francis Harvey*, one of the Justices of the Common Bench, died at his house in *Northampton*, and Sir *Robert Berkley*, the Kings Serjeant of the Middle Temple, was made and sworn Justice of the Kings Bench the eighteenth of October, and *Francis Crawley*, the Queens Serjeant, was made and sworn Justice of the Common Bench the same day.

Halley *versus* Stanton, Trin. 8 Car. rot. 1405.

2. Jones 299. 1 Rol. 64. Action for words. Whereas he had been always of good conversation, and never touched with any suspition of any matter of Felony, and used the trade of buying and selling of Cattel, and thereby gained his living; that the Defendant maliciously spake these words of the Plaintiff, He, (*innuendo* the Plaintiff) was arraigned at *Warwick* for stealing of twelve Hogs, and if he had not made good friends, it had gone hard with him; ubi revera he never was arraigned nor questioned for any Felony. After Verdict upon Not guilty pleaded, it was found for the Plaintiff, and damages twenty pounds; And now Serjeant Crew moved in arrest of Co. 4. 16. a. Judgment, That these words be not actionable; for to say, He was arraigned for Felony, is not any cause of Action, no more than 3 Cr. 279. to say, That one was detected for Felony: For good and honest men may be suspected or arraigned for Felony: and in tricesimo primo Elizabethæ, it was resolved in the Case of Noell an Attorney, 3 Cr. 234. Hob. 177. You were cooped up for forging of Writs; adjudged the Action lies not; so here, &c. wherefore, &c. But all the Court seriatim delivered their opinions, That the Action lies, especially as in this 1 Rol. 64. case it is alledged, that he falsly and maliciously spake these words, 2 Cr. 154. adding, If he had not made good friends, it had gone hard with him, which shews, That he conceived he was guilty of such an offence; Hob. 219. and when it is meerly false, as it appears by averment, That he never was arraigned for any Felony, nor ever committed any, it is the more malicious; and being spoken in disgrace, that none should trust him, it therefore differs from the Case cited, and from the Case 1 Rol. 64. 3 Cr. 279. Pasch. 34 Eliz. betwixt Bayly and Charrington, in the Common Bench, where an Action was brought for saying these words, Thou wert arraigned for two Bullocks: After Verdict, upon Not guilty found for the Plaintiff, it was adjudged that the Action lies not,

not, Because he doth not say, For stealing of Bullocks, nor that any Felony was committed, nor avers that he never was arraigned for Felony, as here. Also a Case was cited, Trin. 8 Jac. in the Kings Bench, betwixt Hayns and Spratt, for saying, Thou wert in *Norwich* Goal for a Robbery committed upon *J. S.* with an Averment, That he never was in any Gaol for Felony; It was adjudged, That the Action lay; Whereupon it was here adjudged for the Plaintiff. 2 Cr. 247.

Southold *versus* Daunston, Trin. 8 Car. rot. 868.

ACtion upon the Case for words. Whereas he was of good name and fame, and was in Communication to be married to such a woman, with whom he should have had such a Portion; That the Defendant to scandalize him, and to hinder and deprive him of his Marriage, spake these words of the Plaintiff, Southold hath been in Bed with Dorchester his Wife, whereby he lost his Marriage. After Verdict upon Not guilty pleaded, and found for the Plaintiff, Bing Serjeant moved, That these words be not actionable; for it may be, he was in bed with her when he was a Child, she being his Nurse, or it may be that her Husband was in bed betwixt them: And words shall be taken in mitiori sensu when any construction can be made to help it. But Jones and my self conceived, that being spoken to disgrace him and deprive him of his Marriage, and he shewing that he was deprived of his Marriage, he hath good cause of Action, and such foreraign intendments as have been alledged shall not be taken, but it shall be adjudged ex affectu dicendi, which is here to hinder him of his Marriage; as it is now found by the Verdict: But they would advise thereof. Residuum postea, adjudged for the Plaintiff. 3. 1 Rol. 35. 1 Rol. 35. 2 Cr. 323. Ante 155. Post. 322.

Favely *versus* Easton, Hill. 6 Car. rot. 1075.

EJectione firmæ. Of a Messuage and two hundred acres of Land, fifty acres of Meadow, and twenty acres of Wood in Bishops Morchard. Upon Not guilty pleaded, and a special Verdict, it appeared, That John Easton Tenant in tail to him and the heirs males of his body, of this Messuage and Land called Eastons, lying in Bishops Morchard, levied a Fine thereof by the name of a Messuage and two hundred acres of Land, fifty acres, &c. in Essington, Easton, and Chilford, to the use of him and his Heirs; and they find, That there is not any Will, or Hamlet, or place known by the name of the Messuage or Tenement called Eastons, out of the Wills or Hamlets, and that none of the said Tenements either be or were in Essington or in Chilford; And whether upon this matter found, a Fine levied of Lands in places known in a Will, not mentioning the Will or Hamlet where the Lands are, be good, was the sole question? And it was argued by Grimston, That it is not good; for 4.

for a Fine ought to be of Lands in a Will or Hamlet, naming the Will or Hamlet wherein they lye, or the places known out of every Will or Hamlet; but not of Land in places known in a Will, as here, a place known without mentioning the Will. But Calthorp for the Plaintiff argued, That the Fine is good, Because it is a personal Action, and although the Covenant be real in respect it concerns Land, yet the Action is personal; and as personal Actions may be brought of Land in places known: by the same reason Fines may be levied. Vid. 1 Hen. 5. 9. per Hales, 21 Ed. 3. 14. 38 Ed. 3. 20. 29 Ed. 3. 10. 7 Ed. 6. Fines Brook 9. 44. For a second reason, A Fine is but an assurance by agreement betwixt the parties, which may be by such names as the parties agree; and he cited for that a
2 Cr. 574. Case in this Court, Pasch. 17 Jac. rot. 140. betwixt Munck and Butler. And of this opinion was Richardson and Jones, and my self
2 Cr. 393. agreed with them; For, a Fine being but an assurance, is favourably to be taken, as a recovery of an Advowson or Pension, though it be not proper, yet being suffered, hath been adjudged good, because it is but a common assurance, although not allowable in other Actions, as Coke lib. 5. fol. 40. Dormers Case is resolved: So this Fine being levied and recorded is good enough: But the Court would advise further thereof, postea pag. 276.

Cawdry *versus* Highley, alias Tythay.

5. ACtion for words. Whereas the Plaintiff was of good conver-
Godb 441. sation, and exercised in the practice of Physick, as well in Lon-
1 Rol. 54. don as in the County of Lincoln and other places, and by reason of his knowledge in the said Art, was, about twenty years since, made Doctor of Physick in Cambridge according to the course of the University, and practised, and ministred Physick to divers Noble-men and others for 21 years last past: That the Defendant (præmissorum non ignarus out of malice, to scandalize him with his Patients, and to withdraw them from medling with him) said of the Plaintiff, and to the Plaintiff, in the presence and hearing of divers, Thou art a Drunken Fool and an Ass; Thou wert never Scholar, and art not worthy to speak to a Scholar, and that I will prove and justifie. After Not guilty pleaded, and found for the Plaintiff, it was moved by Hutton, that the Action lies not; for he doth not shew there was communication with any concerning his skill in Physick, or his practice therein: And the first words, Thou art a Fool and an Ass, be but words of scorn; and the other words touch him only in Scholarship and not in his Art: And a Physitian may be no good Scholar, and yet a good Physitian: And it was compared unto Buckleys Case, for saying of an Atturney, That he is a corrupt man; unless there be conference of his Profession, the Action lies not. Richardson said he was of that opinion; but he would advise: Afterward, Trin. 9 Car.
1 Rol. 54. 'twas adjudged for the Plaintiff.

Manning

Manning and his Wife *versus* Fitſherbert.

ACtion upon the Caſe. For that the Defendant ex malitia upon the Plaintiffs wife crimen feloniæ impoſuit, and had cauſed her to be brought before Mr. Gregory, a Juſtice of Peace of the County of Oxon, et falsò et malitiosè ſaid before him ad tunc et ibidem, That he charged her with felony, for ſtealing of an Hog from one Hundby his Coſen, and required, that ſhe might be bound over to the Aſſiſes; whereupon ſhe was inforced to find Sureties for her appearance at the Aſſiſes. After Verdict, upon Not guilty pleaded, and found for the Plaintiff, and forty ſhillings damages aſſeſt, Littleton Recorder of London moved in arreſt of Judgment, that the Action lies not: Firſt, Becauſe they do not ſay, that the Defendant falsò impoſed upon her the crime of Felony. Secondly, for that they do not ſhew the day and the place, when and whither he cauſed her to be brought. Thirdly, Becauſe they joyn Actions for words, and in nature of a conſpiracy together; ſed non allocantur. For when they ſay that the Defendant, ex malitia, impoſed crimen feloniæ, that implies falsò; and when it is ſaid, he cauſed her to be brought before a Juſtice of the Peace, that is coupled with the other, and ſhall be intended the ſame time and place, eſpecially when it is afterwards, That he ad tunc et ibidem charged her with Felony: And for the other matter, it is not in nature of a conſpiracy, but an aggravation of the falſe and malicious accuſation; whereupon it was adjudged for the Plaintiffs. 6. Poſt. 276.

Chapman *verſus* Allen. Hill. 7 Car. rot. 419.

ACtion *ſur Trover* of five Kine. Upon Not guilty pleaded a ſpecial Verdict was found, That one Belgrave was poſſeſſed of thoſe five Kine, and put them to paſturage with the Defendant, and agreed to pay unto him twelve pence for every Cow weekly, as long as they remained with him at paſture, and that afterwards Belgrave ſold them to the Plaintiff, and he required them of the Defendant, who refuſed to deliver them to the Plaintiff, unleſs he would pay for the paſturage of them for the time that they had been with him, which amounted to ten pounds: Afterwards one Foſter paying him the ſaid ten pounds, by the appointment of Belgrave, he delivered the five Beaſts unto Foſter; and if ſuper totam materiam he be guilty, they find for the Plaintiff, and damages twenty five pounds, and if, &c. then for the Defendant. Jones and my ſelf (abſentibus cæteris Juſticiariorum) conceived, That this denial upon demand, and delivery of them to Foſter, was a converſion, and that he may not detain the Cattel againſt him who bought them, until the ten pounds be paid, but is inforced to have his Action againſt him who put them to paſturage: And it is not like to the Caſes of an Inn-keeper or Taylor: They 7. 2 Rol. 92. Hob. 42. Yelv. 67. Mo. 77

may

may retain the Horse or Garment delivered them until they be satisfied; but not, when one receives Horses or Kine or other Cattel to pasturage, paying for them a weekly sum, unless there be such an agreement betwixt them; whereupon Rule was given, That Judgment should be entred for the Plaintiff.

Johns *versus* Staynar. Hill. 8 Car. rot. 343.

8. ERror of a Judgment in Ejectione firmæ. The Error assigned, because the original writ doth not warrant the Declaration; for the original bears date vicesimo quarto Januarij sexto Caroli, and the Ejectment is supposed tricesimo primo Januarij. And after Verdict, upon Not guilty pleaded and found for the Plaintiff, and Judgment entred, this Error was assigned; and upon Diminution alledged, the writ was certified; and the Defendant pleaded In nullo est Erratum. And now Rolls moved, That it is good notwithstanding; for the writ was retournable crastino Purificationis, and the Tryal was upon the Issue joyned Trin. septimo Caroli; and there doth not appear any continuance upon this; wherefore it shall be intended, That another original writ was brought, which is wanting, and not certified: And compared it to the Case of the Bishop of Worcester, where the Declaration was of a Lease by himself in an Ejectione firmæ, and the writ certified was of a Lease by his Predecessor, and holden, That it should not be intended the Original; whereupon the Action was brought. Also where an Action is brought and tried in Middlesex, and the original certified in London, it shall be intended not to be the same Original, but rather, That it was a Verdict without an Original, which is aided by the Statute, where there is no Original. Vid. postea 281.

Ante 90.

2 Cr. 655.

Harris *versus* Richards. Trin. 7 Car.

9. ASsumpsit. Whereas one Bood was bound to the Plaintiff in an obligation of fourty pounds, for the payment of twenty pounds; and whereas the Defendant was bound to one Hodges in an Obligation of one hundred pounds, dated quinto Februarij decimo nono Jacobi, for the payment of fifty five pounds the fifth of February following, and the said twenty pounds and fifty five pounds being due and not paid, That the Defendant, the first of February 1624. which was, in anno vicesimo secundo Jacobi, in consideration the Plaintiff would forbear the payment of the twenty pounds until 1627. and in consideration the Plaintiff would compound with the said Hodges for the said fifty pounds, and the interest then due, and deliver the said Bonds into his hands, assumed to pay unto him the said twenty pounds and the said fifty pounds, and all the interest, which he should pay or compound for; and alledges in facto, That he did forbear the said twenty pounds: And upon the first of March 1624. paid the said fifty pounds

pounds, and fifteen pounds for interest, and obtained the said Bond into his hands; And that upon such a day, year, and place, he gave notice thereof to the Defendant, and required of him payment thereof according to his promise, who had not paid it, and therefore he brought this Action. After Verdict for the Plaintiff Germin and Calthorp moved in arrest of Judgment, that this Action lies not; for it is no lawful consideration to pay interest; sed non allocatur: For it is to compound a forfeited Bond, which is a good consideration: Also it is no unlawful consideration to pay interest, not being more than is permitted. The second Exception was, that there was not any consideration why the Defendant should pay the twenty pounds, for he had not any benefit thereby, sed non allocatur: For it is a sufficient consideration, that the Plaintiff at his request would forbear it. The third Exception, that it is not alledged he gave notice what he paid for the composition, nor the place nor time, sed non allocatur: For upon the view of the Record it appeared, that the said day and place of the notice were set down: And Jones conceived, If there had not been such a precise notice of the quantity he paid, and when; yet being expressly alledged that he paid so much, and required it, and that it was not paid upon request, it had been sufficient; wherefore it was adjudged for the Plaintiff; and Error being afterward brought, the Judgment was affirmed.

2 Cr. 379.

Ante 242. Ante 70. 77. 242. Post. 409.

Burgoyne *versus* Spurling. Trin. 7 Car. rot. 373.

EJectione firmæ. Upon a special Verdict the Case was. Thomas Jackson a Copyholder, vicesimo Aprilis 6 Car. Reg. surrendred a Copyhold Messuage, and twenty acres of Land, parcel of the Mannor of Hurst, into the hands of two Tenants of the Mannor to the use of Hutchinson and his Heirs, upon condition, that if he paid the said Hutchinson 1060 l. upon the first of July following, that the surrender should be void. And they find the custome of the Mannor, that the Copyholder may surrender his Copyhold into the hands of two Tenants of the Mannor, and that the twenty fifth of May, sexto Caroli, before the payment of the said money, he surrendred an acre, parcel of the twenty acres, into the hands of two Tenants of the Mannor, to the use of William Jackson and his Heirs, and afterwards the Surrenderor paid the said 1060 l. according to the condition, and then surrendred the said Tenements into the hands of the Steward of the Manor, to the use of Richard Price and his Heirs, and afterwards the eighth of October, sexto Caroli, being the first Court after these surrenders made, the two last surrenders were presented, and the said William Jackson was admitted to the said one acre surrendred to the use of him; and the said Richard Price was admitted at the same Court to the said Messuage and twenty Acres, whereof the said one Acre was parcel, according to the surrender made to the use of him; And that the said

10. 1 Ro. 500. Post. 283. 4.

surrender to the use of Hutchinson was never presented; and that there is a Custome within the Mannor, that if any surrender be made out of Court to the use of another, and be not presented at the next Court, it is meerly void; and that the said Richard Price entred into the said one Acre, and made a Lease to the Plaintiff, and the Defendant by command of the said William Jackson *ousted* him: And if, &c. the sole question was, Whether this surrender of the Acre, before the Condition performed, be good or not? Grimston argued for the Plaintiff, that the surrender before he hath performed the Condition, is meerly void; for all the interest is out of him and then he hath not any power to make a surrender; but he agreed, that after the Condition is performed, the Estate is revested in him, and he may make a surrender. Calthorp for the Defendant argued, that this surrender, upon Condition, the Condition being performed before the next Court, and the surrender not presented, the surrender is as if it never had been made, and after such surrender, and before the condition performed, the Copyholder remains still interessed, Co. lib. 4. 28. and the Estate was never out of him; so his surrender to another, he being admitted, is good: And of this opinion Jones and my self were, but cæteris absentibus, adjurnatur. Residuum postea, pag. 283.

Waller and Petty *versus* Sands. Trin. 2 Car. rot. 374.

11. *Action sur Trover & Conversion* of 200 loads of Timber and 200 loads of Stockwood. Upon Not guilty pleaded, and a special Verdict, the Case was. Tenant for life without impeachment of Waste, excepting voluntary Waste, he in the reversion bargains and sells the Timber trees, growing upon the said Land, to the Plaintiff; the Tenant for life cuts down the trees, and sells them to the Defendant, and he sells them to one Green; and whether the Bargaine of the trees shall have an Action of *Trover* against the Vendee of the Tenant for life, the Tenant for life (cutting them and selling them) being yet alive (as it was found by the Verdict) was the question? Hide for the Defendant argued, that he shall not: For during the life of the Tenant for life, although the Lessor, or he in reversion, hath a general property, yet he hath no authority to sell them. The Tenant for life having a particular interest and authority in them, and his sale being void, his Bargainee hath no interest to maintain the Action. Vid. 21 Hen. 6. 46. Dy. 90. Coke, 11. Lyfords Case, fol. 48. b. Cok. Lit. 220. a. Bowls Case, fol. 82. a. Et adjurnatur.

Abt. 242.
Co. 4. 62. b.

Le Marchant *versus* Rawson. Trin. 7 Car. rot. 732.

12. Debt upon the Statute of *secundo Edvardi sexti*. For not setting forth of Tythes: The Defendant pleaded Nil debet, and it was found against him. Germin moved in arrest of Judgment, that

1 Rol. 202.

that it was a Miſtryal, and without ſufficient warrant: For the Jurata upon the Niſi prius is, that Jurat. ponitur in reſpectum inter *le Merchant* Plaintif. & *Rawſon* Defendant. in placito Tranſgreſſionis, uſque poſt octab. Mich. Niſi prius, &c. ſo by this Jurata, which is the Warrant of the Juſtices of Niſi prius, there is not any authority to try the Iſſue, and 'twas held a plain Miſpriſion. But the queſtion was, whether after Trial this be not amendable; for all the Roll was well? The Iſſue was in debt, and it was a meer Miſpriſion of the Clerk to make it in placito Tranſgreſſionis, where it ought to have been in placito Debiti; and the Jurata is not the ſole Warrant to the Juſtices of Niſi prius to proceed: For the Writ of Diſtringas is to try the Iſſue in placito Debiti, Niſi prius, &c. So, that is a Warrant to proceed, although the Record of Niſi prius doth not warrant it. And it hath been ruled, that where, upon ſuch Writ of Diſtringas, the Sheriff returns Nomina Jurator. inter *A.* Querent. & *B.* Defendent. in placito Tranſgreſſionis, where the Writ (to which the Panell is annexed) is in placito Debiti (being but a Miſpriſion of the Sheriffs Clerk in miſreciting the Writ) it ſhall be amended; wherefore the Court would adviſe thereof.

Hob 246.

2 Cr. 528.

Poſt. 278.

Gryffyth *verſus* Biddle,

TReſpaſs, for taking a Bullock and ſelling it: The Defendant juſtifies, becauſe at the Sheriffs Turn, held infra menſem Paſch. viz. decimo octavo Aprilis ſexto Caroli, the Plaintiff was preſented for not appearing at the ſaid Turn, being debito modo ſummonitus, and amerced by the Jury, which was affeered by four of the Jury at forty ſhillings, and after, at the next Seſſions of the Peace, viz. viceſimo ſecundo Aprilis, it was certified and ratified, by ſuch Juſtices of Peace; whereupon the Steward made a Warrant unto him to levy it, and ſo ſold, &c. Upon this Plea it was demurred, and Trotman for the Plaintiff took three Exceptions; Firſt, Becauſe the Defendant doth not alledge, that the Turn was kept, infra menſem poſt feſtum Paſchæ, but infra menſem Paſchæ, which may be as well before Eaſter as after, and by the Statute of viceſimo primo Edvardi tertii, capite decimo quinto, the Turn ought to be kept infra menſem poſt feſtum Paſchæ, et Poſt feſtum Sancti Michaelis. Vid. 7 Hen. 6. 12. 28 Hen. 6. 7. 8 Hen. 7. 4 Dy. 137. where the Seſſions of the Peace is appointed to be kept at one place, et non alibi niſi propter peſtilentiam. Being kept in another place, it was held void. The ſecond Exception, Becauſe the Amercement is alledged to be made by the Jury, and affeered by four of the Jurors, where it ought always to be aſſeſſed by the Court; for it is a judicial Act, and ſhall be affeered by the Affeerers appointed. See old Book of Entries 507. new Book of Entries 119. the third Exception. That the Amercement was levyed by the Defendant, as Baylif, by Warrant from the Steward of the Court, where,

13. 1 Ro. 525. 6. Jones 300.

Co. 8. 39. a.

where, by the Statute of primo Edvardi quarti, capite ſecundo. It is expreſly appointed, That no Fine or Amercement in the Turn, ſhall be levyed, unleſs it be certified at the next Seſſions of the Peace by Indenture, and inrolled there, and by Proceſs made from the Juſtice of the Peace of the Seſſions to the Sheriff; and none of theſe circumſtances were here obſerved; wherefore the levying by warrant from the Steward was ill, and therefore, &c. And of this opinion was all the Court; and thereupon it was adjudged for the Plaintiff.

Favely *verſus* Eaſton, quod vide ante pag. 269.

14. Jones 301. Godb. 440. 2 Ro. 20.

WAs now moved again, and argued by Hedly Serjeant for the Defendant, that this Fine is not good: He agreed, that of places known out of any Will or Hamlet, a Fine may be levyed for neceſſity; as a Precipe may be brought of a Ferry in places known out of any Will or Hamlet, as 34 Hen. 6. 1. 8 Ed. 4. 6. is: But a Fine cannot be of Lands in a Will or Hamlet, by the name of a place known; for the Will being the principal, ought to be named, and the place known, may be known by one name one day, and at another day by another name, according to the name of the parties who are owners thereof; and a Fine ought to be levyed by a name certain, becauſe it is to bind a Stranger by 12 Ed. 4. 37. & 3. Ed. 4. 27. Addition, in a Writ of Debt or other Action where proceſs of outlawry lies, ought not to be but of the Will or Hamlet, and not of the place known; wherefore, this Fine being of Lands in a place known within a Will, is not good. Noy Atturney-General, è contra, the Fine is good; for the Fine is drawn according to the writ of Covenant, and the writ of Covenant is guided by the Indenture and agreement of the parties, viz. what they agree to paſs by ſuch names, and it ought not to vary; And if it vary from the Deed, the other is not bound to levy the Fine; And he relyed upon the Books 21 Ed. 3. 14. 1 Hen. 5. 9. 29. Ed. 3. 11. And all the Juſtices, ſeriatim, delivered their opinions, That it was a good Fine; Whereupon it was adjudged for the Plaintiff, ante pag. 269, 270.

Smith *verſus* Hodgeskins. Paſch. 8 Car. rot. 104.

15. Jones 302. 1 Rol. 43. Ant. 271.

ACtion for words. For that the Defendant malitioſè et falſò crimen Feloniæ ei impoſuit, and cauſed him to be arreſted for Felony. The Defendant pleads, that the Plaintiff aſſaulted him upon the High-way neer Higate, and beat him; whereupon he complained to the Conſtable of this matter, and deſired the Conſtable to attach him, and he refuſed, unleſs the Defendant would ſay, That he charged him with Felony; which ſpeaking, occaſioned as aforeſaid, is the ſpeaking. Upon which Plea the Plaintiff demurres. And now it was moved by Grimſton, that this is no colour of Plea; For the Defendant doth not ſhew any cauſe, to charge

charge him with Felony; therefore it is no excuse or cause of Justification of these words: And of this opinion was all the Court and gave rule for Judgment for the Plaintiff, unless, &c. Afterward, at the day given, the Defendant by Ward moved, that the Action lies not for these words; For it is, that crimen Felonie ei imposuit; which is not in it self cause of Action: And for that he cited a Case to be adjudged in this Court, Mich. 2 Car. betwixt King and Mellor; where Action upon the Case was brought, because crimen Felonie ei imposuit, and said to the Constable present, I charge you to arrest him for Felony. And after Verdict for the Plaintiff it was moved in arrest of Judgment, that these words were not actionable, and adjudged by the Court for the Defendant; and shewed a Copy of the Record: But Jones said he was Judge at that time in this Court, and doth not remember any such Case: But if it were adjudged, it was, Because the words be not laid to be spoken of the Plaintiff. And as this Case is, he conceived clearly, that the Action lies; For it is a malicious scandal, when he chargeth him with Felony; And in his own shewing doth not say what Felony was committed: and of this opinion were Justice Berkley and my self (Richardson chief-Justice being absent.) Whereupon rule was given, that Judgment should be entred for the Plaintiff, unless, &c.

Ant. 271.
Poph. 201.
Lat. 175.
Benl. 202.
1 Rol. 43.

Lawrance *versus* Woodward.

ACtion for words. Because he said falsò et malitiosè of the Plaintiff, Thou didst violently, upon the High-way, take my Purse from me, and four shillings two pence in it, and didst threaten me to cut me off in the midst; but I was forced to run away to save my life; And that he accused him before Mr. Chester Justice of the Peace. After Verdict, upon Not guilty, it was moved by Prynne in arrest of Judgment, that an Action lies not for these words: for he doth not say that he robbed him, nor that he feloniously took away his purse: And it may be taken in mitiori sensu, that he took it in jest, or in other manner, which was not felonious; also it is the more inforced, because it was but an accusation before a Justice of Peace, and for an accusation in form of Justice, an Action lies not: And I doubted thereof, because it is not a direct charge of a felonious taking or robbery, by reason of the Case adjudged, Mich. 10. Jac. betwixt Holland and Stonner, where the Defendant said, Thou art a lewd fellow, Thou didst set upon me by the High-way, and didst take from me my purse, and twenty marks in it, and I will be sworn to it. Being adjudged in the Kings Bench for the Plaintiff, it was reversed in the Exchequer Chamber: For he doth not charge him with felony or robbing of him. But Richardson, Jones, and Berkley held, That the Action lay; For violently taking from him his Purse, and threatning to kill him, and that he was in fear of his life, is a description, that he took it from him felo-

16.
Jones 302.
1 Rol. 74.
2 Cr. 316.
2 Cr. 312.
Yelv. 58.
1 Rol. 74.
Yelv. 145.

niously

loniously and by robbery. Whereupon Rule was given, That Judgment should be entred for the Plaintiff.

Le Marchant *versus* Rawson, ante pag. 275.

17. June. 302. 1 R. l. 202. 2 Cr. 158. R. 99. 2 Cr. 162. 354. 3 Cr. 258.

WAs now moved again, and all the Court, seriatim, delivered their opinion, that it is but a Default in the Clerk, and is amendable: For the Record being good, and the Clerk having it before him, it was meerly a Misprision of him; And the Justices of Nisi prius having a good Record and a good Issue, and that tryed, it is well enough; for they have sufficient by the Record it self, by which it appears unto them what is the Issue: And the Writ of Distringas with the Nisi prius is a sufficient Warrant for them to proceed: And all the Court conceived, It is directly within the Statute of octavo Henrici sexti, capite duodecimo, and amendable; and in the principal Case the Clerk, before and without direction of the Court, had amended it, which amendment was ordered to stand, and that the Plaintiff should have his Judgment: But because it was the Default of the Clerk of the Treasury, to commit such a gross offence, he was fined fourty pounds, and the Clerk who made the amendment, without the Courts direction, was committed to Prison. Vid. Dy. 260. 2 Hen. 4. 6. 7 Ed. 4. 15. 2 Ric. 3. 11. 11 Hen. 6. 11.

Fines *versus* Norton, Trin. 8 Car. rot. 1386.

18. Jones 300.

ERror of a Judgment in the Common Bench in Assumpsit. The Defendant pleaded Non Assumpsit, which was found against him, to his damages of 400 l. and after Judgment, the Error assigned, was, Because upon the Venire facias three and twenty Jurors were returned, and in the Habeas corpora there were four and twenty, viz. the three and twenty, who were returned upon the Venire facias, and one Walter Lambert who was not therein returned, and being returned by Distringas, twelve of them were sworn, whereof the said Walter Lambert was one; and the Issue tryed by them; whereupon Judgment being given, this was assigned for Error, and to be a Mis-tryal; for it is tryed by one who was never returned by the Sheriff upon the Venire facias, which was held by all the Court, (who, seriatim, delivered their opinions) to be a manifest Error, and not aided by any of the Statutes of 32 Hen. 8. 18 Eliz. or 21 Jac. For a Juror misnamed, is not a Juror, who was never returned by the Sheriff, so as he appearing, is sworn without warrant, and is one added for the pleasure, and peradventure by the nomination of the Plaintiff: And this is casus omissus out of all the Statutes, & not remedied by any of them, nor can it be aided by the examination of the Sheriff. But if twelve of the twenty three returned had been sworn, and not the said Lambert, it had been aided by the Statute of decimo octavo Elizabethæ,

Ant. 223.

as

as appears in Tyrrell and Gardiners Case; Wherefore for this cause the Judgment in the Common Bench was reversed. Vid. Co. 5. fol. 42.

Young *versus* Stoell.

ACtion upon the Case. For disturbing the Plaintiff to exercise the Office of Register in Rochester, and shews, that the Office was an ancient Office, and grantable as well in reversion as in possession; and that in anno 1622. this Office was granted unto him by the Bishop of Rochester, habendum post mortem vel sursum redditionem of J. S. who held it for life Exercendum per se vel sufficientem Deputatum suum cum Vadiis, &c. Upon Not guilty pleaded, and Tryal at the Barre, the Plaintiff upon the evidence, to prove it was an ancient Office and grantable in reversion, shewed a Grant of quarto Edvardi sexti to one Robinson in reversion, post mortem Bushfeild & Bushfeild, and confirmed by the Dean and Chapter, which was in Esse, in primo Elizabethæ, and that in septimo Elizabethæ he surrendred and took a new Grant to him and J. S. And it was held by all the Court, that this was a good inducement, that it was anciently so grantable in reversion, but being matter of fact, was to be left to the Jury; But they conceived, if it had not been usually and anciently granted in reversion, yet being granted before the Statute of primo Elizabethæ, and being in Esse at the time, and the Estate confirmed by the Dean and Chapter, that it was a good Grant. Secondly, where it was moved, that the reversion of an Office cannot be granted by a common person, it was agreed by the Court, that it cannot be granted as a reversion, and by the name of a reversion; For there is no reversion of an Office, unless it be an Office of Inheritance, yet it may well be granted in reversion, Habendum, after the death of the Grantee for life. Thirdly, It was moved, that this Grant in reversion to Young is void, because he was a person unable at the time of the Grant to exercise it, for he was an Infant of the age of eleven years and no more; and although it be granted to him, habendum & exercendum per se vel sufficientem Deputatum suum, yet it is not good; for an Infant cannot make a Deputy: And although at the time when the Tenant for life of the Office died, he was of the age of thirty years, yet being void at the time of the Grant; it cannot be made good by any subsequent Act; but Jones, Berkley, and I my self, (Richardson being absent) held, That the Grant was good, notwithstanding that Exception: For the Grant is not void, because at that time he was an Infant, or because an Infant cannot make a Deputy: For an Infant who can write and understand the Latine tongue, may be a Register, and may have sufficient knowledge to write and Register Acts, which is sufficient for his place; at least wise he may have sufficient knowledge to make an able Deputy; and if he put in one who is insufficient, it is cause of forfeiture of the Office;

19.
Jones 310. Post. 555. 2 Rol. 153. 4.
Dier 259. a.
Co. 10. 61.
Co. 11. 4. a.
3 Cr. 336.
3 Cr. 637.
Post. 556. Co. Littl. 3. b.
Post. 556.

Office; but as this case is, it was granted unto him in Reversion, after the death of the then Register, and he being able to execute it at such time as the Office fell, it is sufficient. Fourthly, It was objected, that the Office was usually granted with a fee of a Robe, or thirteen shillings four pence, and here the Office is granted with the fee of the Robe, and not in the disjunative, or thirteen shillings four pence, sed non allocatur; for it being after the Grant in the Habendum shall not make the Grant to be void; and it is only void quoad the fee: And the Court said to the Jury and Counsel, that if they will, they may find the matter specially; But no special Verdict was given, but a general Verdict for the Plaintiff.

Ant. 49.

Paschæ 8 Car. rot.

20. Jones 306. Post. 439.

A Writ issued out of the Chancery, bearing date decimo tertio Martii, septimo Caroli, to the Sheriff of Gloucester, commanding him per Sacramenta, proborum & legalium hominum de Comitat. prædict. to enquire, Qui Malefactores & pacis Regis Preturbatores apud forestam de Deane, sepes & fossata *Johan. Gibbons* ibid. per ipsum nuper levat. noctanter, aut tali tempore, quo factum eorum sciri non credebant, prosternaverunt, to the damages of the said John, & contra pacem; Et si prædictus *Johan.* fecerit te securum de clamore suo prosequendo, tunc pone per Vadios et salvos Plegios, omnes illos quos culpabiles ibidem inveneris, quod sint coram nobis in quindena Paschæ ubicunque, &c. ad respondendum nobis de pace fracta quam prædicto *Johanni* de transgressione, &c. The Sheriff at quindena Paschæ returned the Enquisition, quòd virtute brevis prædict. ad inquirendum (reciting the Writ) per Sacramentum 12: &c. qui dicunt super Sacramentum suum; quòd quidam Malefactores, et pacis Regis Perturbatores vi et armis sepes, viz. 769 particarum sepium et fossarum ipsius *Joh. Gib.* apud Forestam de Deane, nuper ante per ipsum levat. prosternaverunt; sed qui aliquam partem inde prostraverunt Juratores prædicti ignorant: Et similiter dicunt quod vi armata, et cum multitudine gentium, Malefactores et pacis Perturbatores prædicti fuerunt; Ita quod nullus ad ipsos appropinquare ad ipsos cognoscend. ausus fuit, et tali tempore quo factum eorum sciri non credebant, sepes et fossata prædicta prostraverunt et redierunt. And hereupon a Writ of Distringas issued reciting the first Writ, and the Enquisition thereupon returned, and commanding the Sheriff of Gloucester, quod distringat propinquas villatas sepibus et fossatis prædictis circum adjacent. prædictas sepes et fossata prostrata levare ad custus suos proprios. And by the same Writ it was commanded to enquire quæ damna prædictus *Johan. Gibbons* occasione prostrationis prædictæ 769 particarum sepium et fossarum sustinuit, et damna illa eid. *Johan. Gibbons* restituere, and to return the Writ and Enquisition in octab. Trin. Hereupon the Sheriff certified, quod Villa de Bretills, et viginti aliæ Villæ (naming them) in the County of Gloucester sunt propinqua Villata sepibus et fossatis

infra

infra mentionatis circumadjacentes, and further certified. quod damnum in quadam Inquisitione brevi annexat. eid. *Johan. Gibbon.* propter brevitatem temporis restituere non potest; and returned Issues upon every of the said Villages, and that the residue of the execution of the Writ appeared in quadam Inquisitione eidem brevi annexat. and returned the Enquisition, whereby was found, that the said John Gibbons sustinuit damnum occasione præmissorum ad 200 l. And upon this return Brampston Serjeant took divers exceptions; First, For the Forest of Dean; There is not any Parish named wherein it lies, sed non allocatur; for a Forest is certain enough by it self. Secondly, Because this Writ is founded upon the Statute of Westminster 2. cap. 49. That if the Lord hath right to improve any his Waste, &c. and his hedges be destroyed noctanter, and it cannot be known by the Verdict of the Assise or Jury who those Malefactors were, the Towns near adjoyning shall be distrained to levy the hedge or dike at their own costs, and to yield damages: And he doth not shew here, that he is Lord of the said Waste, and hath right to improve it: But Noy the Kings Atturney, who devised this writ, said, that it sufficeth in a writ to shew the grief breviter; And if he be not any such person as may inclose, it ought to be shewn on the other side. Thirdly, It was objected, that this Inclosure is not shewn to be with the Kings licence, and then it is without warrant: But thereto was answered, That it ought to come in by Plea, after appearance, and not by way of exception; It was also moved by Noy, That they had no day in Court, because the writ and the Enquisition were returned the last Term, and they then not appearing, and pleading, They shall not be received to come in by way of exceptions in this manner. And he shewed a Record Trin. 15. Ed. 1. rot. 3. where such a writ was awarded for one Nicholas de Stapleton, whose hedges were cast down noctanter, and not being known by whom, he had a writ to distrain propinquas Villas to repair; and he said, that was the president for this Case; And he prayed a new Distringas might be awarded, Et habuit.

Post. 440.

R. 50.

Post. 440.

Post. 580.

Johns *versus* Staynar, quod vide ante pag. 272. N. 8.

WAs now moved again by Rolls for the Defendant in the writ of Error; and he vouched the Case in Hill. 20 Jac. Calthorp and Culpeper. where Trespass of assault and battery was brought and tryed in Middlesex, and the Bill upon the File was in London, It was resolved, That it was a Declaration and Tryal without Bill, which is aided by the Statute; wherefore it was there adjudged for the Plaintiff. And another president Hill. 22 Jac. rot. 503. betwixt Kelley and Reynell, where debt was brought in Exceter, and the writ supposed it to be within the County of Devon, After Verdict it was held, that the Writ in one County cannot be intended for an Action in another County, and therefore it was a

21. Jones 304. 2 Cr. 655. 2 Cr. 674. Ant. 90. 91. p. 327.

2 Cr.479. Ant.90.91. Poll.327. Tryal without an Original: But all the Court here held, that this Judgment was erroneous, because this Original is certified as an Original in this Action, which is betwixt the same Parties of the same Land and of the same Term, and being taken out before the cause of Action, it is a vicious and an ill Original, not aided by 2 Cr.185. 3 Cr.722. any Statute; and compared it to Bishops Case, Co. 5.37. whereupon they all agreed, that the Judgment was erroneous; and therefore it was reversed.

John George and his Wife *versus* Harvy.

22. Jones 325. 1 Ro.45. ACtion upon the Case. For that the Plaintiff having communication at Burye, with the Defendant, of his, the said Plaintiffs wife, the Defendant said, She (*innuendo* the Plaintiffs wife) is a Witch and a strong Witch. After Verdict, &c. Whitfeild moved in arrest of Judgment, that these words are not actionable, unless he had said, She committed Witchcraft in bewitching some person or his goods, so as she should be punishable by the Statute of primo Jacobi; for the word Witch generally is but a word of scolding, and most commonly used of bewitching one with his words or countenance; and he said, it was so adjudged in decimo sexto Jacobi, betwixt Hawkes and Auge: But it was alledged on the other side by Grimston, That Mich. 4. Car. betwixt Hughs and Farrer, for calling one Witch, and that she had bewitched his drink, it was adjudged that the Action well lies: But because it was said there were precedents both ways, the Court would advise. Residuum postea, pag. 324. Post.320. Ant.141.

Collis *versus* Malin. Trin. 8 Car.

23. Jones 304. ACtion for words. Whereas the Plaintiff had used per magnum tempus the Trade of buying and selling of Cattle, and divers times bought upon his credit: That the Defendant said of him Thou art a Bankrupt; the Defendant pleaded Not guilty, and found against him; And because he did not say, that he used the Trade at the time of the words speaking, but per magnum tempus usus fuit, which may be divers years before, and the Action lies not, unless at the time of speaking the words, he used the Trade of buying land selling of Cattle; therefore it was adjudged for the Defendant. 3 Cr.273. 2 Cr.222. Yelv. 21.

Parker *versus* Grigson. Trin. 8 Car. rot. 130. or 1306.

24. Jones 304. 2 Cr. 209. Hob. 130. 2 Cr. 186. 580. EJectione firmæ. After Verdict it was moved by Grimston in stay of Judgment, that there was not any Bill upon the File; And it was prayed, that the Court would order that none might be filed: But the Court held, it to be aided by the equity of the Statute of decimo octavo Elizabethæ, and in Woodhouse and Willis Case, Trin. decimo sexto Jacobi, rot. 945. so resolved in a writ of Error;

Error; Wherefore Judgment was given for the Plaintiff, notwithstanding this exception.

Stirley *versus* Hill.

ACtion for words. For that he said to the brother of the Plaintiff, Thy brother was whipped about *Taunton* Cross for stealing of Sheep, or burned in the hand or the shoulder. After Verdict, upon Not guilty pleaded, and found for the Plaintiff, it was moved in arrest of Judgment, that these words do not import any certain slander: And of that opinion was all the Court; wherefore it was adjudged for the Defendant. 25. Jones 308.

Gryfill *versus* Whitchcott. Trin. 8 Car. rot 420

DEmurrer in Ejectione firmæ. The question was, If one mortgage Land for 100 l. and takes Bond for the interest of 8 l. per annum, payable half yearly, whether that makes the Bargain usurious against the Statute, Because as it was pretended, the use ought not to be paid until the end of the year, and contracting to have half of it yearly, is not warrantable by the Statute? But the Court, upon the first argument at the Barre, over-ruled it, that it is not any usurious Contract, contrary to the Statutes, because the 100 l. is let for a year; and the reservation is not of more, but of what is permitted by the Statutes; And although the Interest is reserved payable half yearly, it is allowable; For he doth not receive any interest for more or less time than his money is forborn; Wherefore, without difficulty, it was adjudged for the Plaintiff; And Error being brought in the Exchequer Chamber, and the Error assigned in point of Law, the Judgment was affirmed. 26. Jones 303. Moor. 644. Ant. 17. 2 Cr. 26.

Burgaine *versus* Spurling. Vid. ante pag. 273. N. 10.

THis Case was now argued again. And it was strongly urged for the Plaintiff, that by the first surrender, all the Estate of the Copyhold until the Condition performed, is out of the Surrenderor, so as he hath not any interest left in him to make another surrender, although he afterwards should perform the Condition; for he cannot make the second surrender, which was void, to be good: But when the Condition is performed, the Estate is revested in him; and then he might well make the third surrender. But it was thereto answered, and resolved by the Court, that the second surrender is not hindred by the first; for nothing passed thereby, until it was presented in Court, and admittance thereupon; but the interest and right of the Copyhold, and the possession remained with him who made the surrender, so as he may transferre it to any other, and it shall be good, if the first surrender doth not take 27. Jones 306. 1 Rol. 500. 473. 1 Rol. 500. Co. Litt. l. 62. a. 2 Cr. 403. 3 Cr. 349. Post. 569.

take effect: For the surrender into the hands of the Tenants, was but an inchoation of his Estate, to whose use the surrender was made, and such an inchoation as had no perfection, but became meerly void, and the second surrender good. As a bargain and sale to one, and after a bargain and sale to another; the first is not inrolled, but only the second; the second is good. So a Grant of a reversion to one, and before Attornment, a Grant thereof to another; and to the second Grantee, Attornment is made, the second Grant is good, et nihil operatur by the first. So where a fine is acknowledged to one, upon a Dedimus potestatem, and afterward a second is acknowledged, and the first fine not recorded, the second fine is good: But if the first fine had been recorded in Court in time convenient (viz.) the next Term, it had been good, and the second had been meerly void. So this first surrender, when it was not presented at the next Court, is as if none had been made, and meerly void ab initio, and therefore the second surrender good. Secondly, All the Court agreed, that whereas in the principal Case, the Condition was for the payment of 1060 l. upon the first of July, and the payment was made before the first of July, viz. upon decimo sexto Junii, and an acceptance thereof, it is a good performance of the Condition. Note that the first surrender is meerly void, and as if it never had been made, and that after the surrender, he who surrendred remained always Copyholder, so as it should descend to his Heir, and he might dispose thereof. But if the first surrender had been presented at the next Court, that would have so bound the Land, as all mean Acts done or made afterwards, would have been void. Judgment for the Plaintiff.

Ante 218. 2 Cr. 53. Hob. 165. Pl. Com. 291. a. Co. Litt. 212. 2 Cr. 435. Mo. 47. 3 Cr. 142. R. 658.

Delves *versus* Clerk.

28. ASsumpsit. Whereas the Defendant was seised of such Lands in Chesselhurst in the County of Kent, vicesimo primo Maii 1631 in fee, and was in communication with the Plaintiff, to sell the same for such a summe, that the Defendant, Ad tunc et ibidem, viz. prædicto vicesimo primo Maii, anno 1631. apud London, prædict. in Parochia beatæ Mariæ, &c. in consideration of such a summe, promised to assure, &c. Upon Non assumpsit, the Tryal was in London, and exception taken in arrest of Judgment, that it was a Mis-tryal, and not aided by any of the Statutes: For it ought to have been tryed in Kent where the Land lies, and where, by the Ad tunc et ibidem, the promise is, and the Venue cannot be altered: And of this opinion was all the Court, that the Videlicet is idle, and may not alter it; Whereupon a Venire facias de novo was awarded.

Post. 295.

Cucko

Cucko *versus* Starre.

PRohibition was prayed to the spiritual Court to stay a Suit there for defamation, for these words, Thou art a Drunkard or a drunken Fellow. And by the opinion of Jones, Berkley, and my self, a Prohibition was granted: For these words do not concern any spiritual matter, but meerly temporal; and they be but convitium temporale, and a common phrase of brawling, for which there ought not to be Suit in the spiritual Court; and so it was held in Martyn Calthorps Case, in the Common Bench: But Richardson doubted thereof, because the spiritual Court as well as the temporal may meddle with the punishment of Drunkenness; so it is not meerly temporal: But he assented to the grant of a Prohibition, and the party may, after declaration (if he will) demurre thereto; whereupon a Prohibition was granted. 29. Jones 305. 2 Ro. 296. Post. 309. Ante 111. Ant. 229.

Major *versus* Talbot, Pasch. 8 Car. rot. 419.

COvenant. Whereas one Selbie and Elizabeth his Wife, were seised of such an House and Land, to them and the Heirs of the Husband, and so seised, by Indenture, let that house and land to the Defendant, wherein he covenants with them, and either of them, and with the Heirs and Assignes of the Husband, for doing all reparations: The Husband and Wife conveyed that reversion to the Plaintiff in fee, who brings Covenant for not repairing of the said house, declaring upon all this matter, and concluding, quod Actio ei accrevit, as Assignee to the Husband, and averres not the Wife to be dead. Hereupon the Defendant demurres, which was argued by Rolls for the Plaintiff, and by Merefeild for the Defendant, and by him much insisted, that the Plaintiff having his Estate, as well from the Wife (who had an Estate for life) as from him who had the fee, ought to have brought Covenant as Assignée to both, and not as Assignee to him who had the Inheritance, unless the Wifes death had been alledged; And for that purpose, he cited Treports Case, Co. 6. fol. 15. & Dy. 234. 6. But all the Court held, that the Action is well brought, being brought by the Assignee of him who hath the Inheritance, and so no prejudice to any, and the Estate for life, being transferred with the fee, is thereby drowned and confounded; so as he being Assignee of the whole Estate, and shewing all the matter, it is good enough; wherefore it was adjudged for the Plaintiff. 30. Jones 305. R. 659.

Kerchevall *versus* Smith & .....

ACtion upon the Case against them, Because they being Church-wardens of ..... presented the Plaintiff falsò et malitiosè upon a pretended fame of incontinency. Upon Not guilty, 31. Jones 305.

guilty, it was found for the Defendants, and moved, that they might have double costs, because they were troubled and vexed for matter which did concern their Office: But it was resolved, It was not within the Statute; for it is meerly ecclesiastical; and the makers of the Statute never intended to give double cost, but where men are vexed concerning temporal matters, which they shall do by virtue of their Office, and not for presentments concerning matters of fame.

Ante 175.

Nevill *versus* South and Delabarre, in the Exchequer Chamber.

32. 1 Rol. 929.

ERror, brought in the Exchequer Chamber of a Judgment in a Scire facias by an Executor, to have execution of a Debt recovered by the Testator. And it was now moved, that the Record was not well removed; for no writ of Error lies there, upon a Judgment in a Scire facias; for the Statute gives it only in seven several Cases, viz. in Suits or Actions of Debt, Detinue, Covenant, Accompt, Actions upon the Case, Ejectione firmæ, or Trespass; So a Scire facias is not mentioned; and it hath been adjudged, That Error lies not there of a Judgment in a Scire facias against bayl, nor in a writ de scandalis Magnatum. But the Court doubted whether this Scire facias, being grounded upon a Judgment in an Action of Debt, be not within the equity of the Statute; therefore they would further advise.

Ante 143.

Post. 300. Ante 142. 2 Cr. 171. R. 650. Post. 464.

Hitchman *versus* Porter. Trin. 8 Car. rot. 483.

33.

ERror of a Judgment in the Common Bench. The Error assigned was. Whereas an Action upon the Case was brought in nature of a Conspiracy, that the Defendant falsò et malitiosè imposed upon him crimen talis feloniæ, and caused him to be arrested thereupon, and bound over to the Assises, and exhibited a Bill of Endictment against him for that supposed Felony, and caused him to be endicted and detained in Prison, untill he was Legitimo modo acquietatus; And he doth not say (inde) which was a principal word, and the principal cause of damages: And it was said, that betwixt Stiles and Pricket, for this point, Judgment was reversed; And that in this Term, for this default in the like Action, betwixt the same parties, Judgment was given, Quod querens nihil capieret per breve; And this Judgment here in question passed sub silentio: Sed adjurnatur, residuum postea pag. 315. Post. 420.

2 Cr. 230.

Lyster *versus* Bromley. Trin. 8 Car. rot. 235

34. Jones 307. 1 Rol. 738. 2 Cr. 103. 4 Cr. 335.

ERror of a Judgment in the Common Bench. Debt, by the Under-Sheriff for his fees, where he demanded 12 l. 10 s. for executing of a Capias ad satisfaciendum of 400 l. The Error assigned was, because he demanded more for his fees than the Statute

tute of viceſimo nono Elizabethæ cap. 4. allowes, viz. whereas he ought to have but ſix pence for every pound where the Execution is above 100 l. and twelve pence for every pound where the Execution is but 100 l. or under; he taking 5 l. for the firſt 100 l. and 50 s. for every of the other hundred pounds, had taken more than ſix pence in the pound for the ſaid Execution of 400 l. And for this cauſe the Error was aſſigned, but a preſident ſhewn, Hill. primo Caroli rot. 721. betwixt Jeſſon and Weſtley in this Court, where it is adjudged what a Sheriff ought to have for his fees (viz.) 5 l. for the firſt 100 l. and 50 s. for every other 100 l. over and above the firſt hundred pounds: Otherwiſe if the Execution ſhould be for 120 l. or 160 l. he ſhould have leſs; then for the Execution of 100 l. which never was the intent of the Law; for the Law gives allowance to the Sheriff for executing Proceſs, which by conſtruction ſhall be moſt favourably taken, and according to the intent of the Law-makers, and not that he ſhall have leſs for the Execution of 140 l. then for the Execution of 100 l. And another preſident was ſhewn, Paſch. 14 Jac. rot. 537. where was the like Judgment: And of this opinion was all the Court (abſente Richardſon) but we would adviſe. And the next day after, Richardſon chief Juſtice being in Court, it was moved again, and the Record of this Court Hill. primo Caroli. betwixt Jeſſon Sheriff of Coventry and Weſtley was produced, wherein he declares in debt for his fees (for taking Execution of a Judgment of 400 l.) 12 l. 10 s. And upon this Declaration it was demurred, and two queſtions then made: Firſt, whether the Sheriff may demand twelve pence in the pound for the firſt 100 l. and ſix pence after, for every 100 l. or that he ought to have but ſix pence in the pound, where the ſumm exceeds 100 l. And it was adjudged, that he ſhall have twelve pence for every pound of the firſt 100 l. and ſix pence for every other pound over the 100 l. Secondly, Although it be provided in the Statute of viceſimo nono Elizabethæ, That this ſhall not extend to Sheriffs of Cities or Corporations, it was held, that it was only to be intended for the executing Judgments in the Courts of the ſaid Corporations, and not to the Sheriffs of Cities or Corporations, for the executing Judgments out of ſuperior Courts. Another preſident was ſhewn Paſch. 4 Jac. rot. 551. Proby verſus Michell, in an Action of Debt for fees, and adjudged accordingly. And whereas Grimſton cited a Caſe in the Common Bench, Mich. 17 Jac. betwixt Symſon and Bathurſt, where the opinion was, That the Sheriff ought to have but ſix pence in the pound where it is above 100 l. And that the Judgment was there entred for the Defendant. Jones ſaid, the reaſon of that Judgment, was not for the cauſe now alledged, but for that the Sheriff had taken a Bond for his fees, and had brought an Action of Debt upon that Bond, and the Defendant had pleaded the Statute of viceſimo tertio Henrici ſexti, in avoidance thereof. The Court there conceived, although he might have ſuch fees as were allowed by the Statute, yet he might not take

Lat. 17. 51. Pop. 173. Ben. 191. Noy 75.

Noy 28.

3 Cr. 335.

3 Cr. 264.

Moor 853.

Ant. 150. Winch. 20. 50. Lat. 20. 52.

take Bond for them; for under colour thereof he might so have double fees, &c. wherefore here, after argument, the Judgment was affirmed.

Drake *versus* Corderoy. Mich. 7 Car. rot. 280. or 28.

35. Jones 307. 1 Ro. 41. ERror of a Judgment in the Common Bench, in Action for words. Whereas the Plaintiff was Constable of D. and sworn before the Justices of Peace in the County of Wilts, at their Quarter-Sessions, concerning an Affray made by the Defendant upon one Fisher: That the Defendant, ad tunc & ibidem in the said Court, in the presence of the Justices, said, He (innuendo the Plaintiff) is foresworn, Without any mentioning of the said oath; the Defendant justifies, shewing the oath which he made in the open Sessions, and that it was false. Upon which justification the Plaintiff takes issue, which was found; and Judgment for the Plaintiff, and Error assigned, that the words be not actionable, because he doth not say in the declaration, that he was foresworn, by his oath taken in any Court, and to say generally, that the Plaintiff is foresworn, Action lies not; but to say he is perjured, Action lies. And here it is not shewn, That he was forsworn by reason of his oath taken at the Sessions; wherefore the Declaration is not good, nor is it aided by the Plea. But all the Court held, that if there were any doubt, it was upon the Declaration, which is incertain, Because he doth not shew, that the words intended a false oath in a Court of Record: Yet when the Defendant by his Plea confesseth he spake those words by reason of his oath taken at the Sessions, that clears the question, whereof he intended to speak; Wherefore the Judgment was affirmed.

3 Cr. 394.

Jones 307. Post. 560. Ante 209.

Bland *versus* Inman. Hill. 7 Car. rot. 550.

36. Godb. 448. 2 Ro. 450. 1. Jones 308. 2 Sand. 96, 97. TResp. Upon a special Verdict the Case was, Thomas Spence possessed of a Lease for a 100 years by Indenture, betwixt him and Joan his Wife of the one part, & Tisdale on the other part, which is found to be sealed and delivered only by Spence, and not by his Wife, assignes all their Estate in the Lease to Tisdale, reddendo & solvendo to him and Joan his wife, durante termino prædicto, to them and the Survivor of them, if they shall live so long, 7 l. at Michaelmas and the Annuntiation, with a Proviso, That if the said Rent be behind at any of the said Feasts, or fourty dayes after, and not paid to him or his wife, or the Survivor of them, that then it shall be lawful to the said Spence and his wife, and to the Survivor of them, and to their Assignes, and to the Assignes of the Survivor of them, to re-enter and have again, as in their former Estate. Tisdale enters, and Spence dies, and Joan survives him,

him, and for forty days after the Annunciation next following, the Rent being behind and not paid, the wife the last day demands it; and one Walter the Administrator of Spence demands also the rent which is not paid. Tysdale assigns his Estate to the Plaintiff, and Walter, as Administrator of Spence, enters for non-payment, and lets to the Defendant; And if, &c. This Case was oftentimes argued at the Bar, and after at the Bench; The first question was, Whether this reservation be good to the wife, because she had not any interest to pass, and never sealed the Deed? And if it be not good to the wife, because she is a Stranger to the Interest and to the Deed, whether it be not good to the husband, and to his Executors and Administrators as Assigns in Law, during the time of the wifes life? And whether the Administrator, for the benefit of the wife, shall not enter into the Land? And it was urged by Mr. Grimston on the part of the Defendant, That the words being reddendo & solvendo to the husband and wife, durante toto termino, and to the Survivor of them it being by Indenture, is good, by way of reservation to the husband; and the word solvendo shall be construed as by way of grant to the wife: For although she did not seal, yet she being named in the Deed, and the party Grantee sealing and delivering it to the husband and wife, It shall be construed by way of grant to her; and she may take by the Deed, being named therein, although she never sealed any part thereof: and of that Opinion was Barkley Justice, and cited one Constables Case, That where Lessee for years assigned his term, rendring rent durante termino annually unto him, that includes his Executors and Administrators, although they be not named, as in the Case of Litt. Condition to pay a sum to a Feoffee such a day, and he dies before the day, it shall be paid to his Executors, for they represent the Testator. To the second, Barkley conceived, If it be not good to the wife, neither by way of a Reservation, as he agreed that could not be, because she is a Stranger to the Estate and to the Deed; yet by way of grant, by the words reddendo & solvendo, he conceived, the Deed might take effect; yet he held, That the Administrator is Assignee, who may enter for the Condition broken, for the wifes benefit. But Richardson chief Justice, Jones, and my self agreed, That although the reddendo & solvendo durante termino, if there had been no more said, had been a reservation during the term: Yet when he doth not rest upon the exposition of the Law, but it is, Rendring to him and his wife, and the Survivor of them, if they live so long; that is an express reservation that it shall not be during all the Term, but to him and his wife and the Survivor of them: and the reservation to his wife is void, because she is no party in Interest or to the Deed; and to the Survivor of them is void also, to give the wife any advantage thereby; and therefore the rent endures no longer than during the life of the husband. Vid. 10 Ed. 4. 18. 21 Hen. 7. 25. Co. lib. 8. fol. 70. b. in Whitlocks Case, Co. Lit. 47. a. & 143. b. and Hill. 33 Eliz. betwixt Richmond and Butcher, where one lets reserving rent to

Litt. Sect. 339

R. 613.

R. 159.

Dier 45. a. Co. Litt. 213. a.

him his Executors and Assigns, he having an Inheritance in the
Co. Litt. 47. a. Land, it was adjudged a void reservation to the Executor, the
reversion being in the Heir; yet the rent shall not be paid unto him
3 Cr. 217. because he is not named; and although it were there, durante ter-
mino, it was not material. And Jones said, That so it was ad-
2 Ro. 451. judged betwixt Brown and S. secundo Caroli. Also they all held,
that here this word Solvendo cannot inure by way of grant to
the wife, when it is by way of reservation to the husband: For
it shall not be construed to inure in several manners, no more than if
one bargains, sells, demiseth, and grants, it shall not inure by bar-
gain and sale and demise, but by the one of them, at the election of
Co. 2. 35. b. the Bargainee. And in the Reservation, Assignee is not mentioned:
So that it cannot give any interest to the Administrator as Assignee
in Law. And in the Proviso Assignee is mentioned, but that is to
the Assignees of the Survivor of them: So that the Assignee in Law
of the husband cannot claim it; for he did not survive, but the
wife. And the wife can take no advantage of the Condition, be-
cause she is a Stranger to the Estate and to the Deed, seeing she did
not conceale the Deed: And if the Condition should go to the wife, yet
she cannot enter for the Condition, but only the Administrator of
the husband, who hath not any title of entry: And the Defendant
claims by him; wherefore it was adjudged for the Plaintiff. And
upon this Judgment, a Writ of Error was forthwith brought, re-
tournable in the Exchequer Chamber, and the Judgment was there
affirmed, Mich. decimo Caroli.

Termino

Termino Hillarij, anno octavo *Caroli* Regis, in Banco Regis.

Carlion *versus* Mill. Hill. 7 Car. rot. 1147.

ACtion upon the Case. For that the Defendant being an Apparator under the Bishop of Excester, malitiously, and without colour or cause of suspicion of incontinency, of his own proper malice procured the Plaintiff ex officio, upon pretence of fame of Incontinency with one Edith; (whereas there was no such fame or just cause of suspicion) to be cited to the Consistory Court of Excester, and there to be at great charges and vexation, until he was cleared by sentence, which was to his great discredit and cause of great expences and losses, for which, &c. Upon Not guilty pleaded, and found for the Plaintiff, It was moved by Ashley Serjeant, in arrest of Judgment, That in this Case, an Action lies not; For he did nothing, but as an Informer, and by vertue of his Office. But all the Court (absente Richardson) held, That the Action well lies; For it is alledged, That he falsò & malitiosè caused him to be cited, upon pretence of Fame where there was no offence committed: And avers that there was not any such Fame; so as he did it maliciously, and of his own head, and caused him to be unjustly vexed, which was to raise gain to himself; Whereupon they conceived he being found guilty for it, the Action well lies, and therefore Rule was given to enter Judgment for the Plaintiff, unless other cause was shewn: And upon a second motion, Richardson chief Justice being present, Judgment was given for the Plaintiff. 1. Jones 312. 1 Rol. 93. 2 Cr. 351. R. 406, 463. 2 Cr. 356. 1 Rol. 93.

Hopestill Tildens Case. Ante pag. 264.

NOte that the first day of this Term, Hopestill Tilden was arraigned at the Bar for Buggery, supposed to be committed at Hide, being one of the Cinque Ports, he being Endicted there, and the Record removed hither by Cerciorari, directed to the Major and Jurats of the said Hill, and not to the Lord Warden of the Cinque Ports. The Prisoner challenged one of the Jurors, being the Foreman, who was sworn, and marked, sworn by the Clerk, before the challenge was heard by the Court: And therefore without the assent of the Attorney General then present, they would not alter the Record, and because he would not assent to al- 2. Ante 252. Post. 347.

ter the Record, the challenge was disallowed. And afterwards upon evidence at the Bar, divers witnesses were produced by the
3 Inst. 79. Defendant, which were heard without Oath: But some of them witnessing matter, which the Attorney conceived would make for the King, were upon the desire of the said Attorney sworn, and after ordered upon their said Oath, to deliver their knowledge. And afterward, the Prisoner was acquitted. But because the evidence (if it had been believed by the Jury) was very strong against the Prisoner, Richardson chief Justice and Jones appointed, that the Prisoner should be bound to his good behaviour; whereupon, against the opinion of my self and Justice Berkley, he was so bound.

Rose *versus* Bartlett, Trin. 7. Car. rot. 497.

2 Ro. 58. 3. EJectione firmæ. Of the Demise of John Rose and Elizabeth his wife, of fourty acres of Land, and two acres of Meadow in Burnham for three years. Upon Not guilty a special Verdict was found, That Philip Scudamore was seised in fee of the Land in the Declaration, Anno 44 Eliz. and by Indenture demised it, by the name of four Closes of Pasture in Burnham, for a hundred years to Richard Batyne: And that Richard Batyne entred and was possessed, and being so possest and seised in fee of other Lands and Tenements in Burnham. Afterwards, viz. duodecimo Aprilis, tertio Caroli, made his will in writing, which is found in hæc verba, I will, That my wife *Elizabeth* shall have *Burnhams* and the Lands thereunto belonging, being three half acres in *Lentfield:* And my will is, if she do marry, my Son *Nicholas* shall have *Burnhams*, and three half acres lying in *Lentfield*. Item I will, my Son *Bartholmew* shall have for his maintenance out of the Land 5 l. yearly, as long as she keepeth her self unmarried. Item I will & bequeath to my said wife *Elizabeth* all the rest of my Lands lying in the Parishes of *Burnham* and *Hitchman* during the time of her life, and afterwards to my Son *Bartholmew*. Also I make my wife, my full and whole Executrix of all my Cattle, Corn and moveable Goods: Except such as I have appointed to be sold for payment of Legacies, prout *per le* volunt, &c. They find that Richard Batyne died and the said Elizabeth proved the Will in the Prerogative Court, Quodque Administratio omnium bonorum jurium ac Creditorum dictum *Richardum Batyne* & ejus Testamentum qualitercunq; concernent. by the Judge of the Prerogative Court was committed to the said Elizabeth, that she afterward took to Husband the Defendant, whereby they were possessed of the said Lease: And that the said Bartlett, assigned that Lease to Richard Hammond upon the condition for the payment of 30 l. at a day certain, who failing of the payment thereof, reassigned afterwards that Lease to the Defendant, that the said Elizabeth died; and afterwards the said Bartholmew died, and that Elizabeth the wife of Bartholmew obtained Letters of Administration de bonis

bonis Richardi Batyne non Administrat. by Elizabeth the wife of Richard Batyne, who took John Rose to husband, and they let to the Plaintiff, and the Defendant *ousted* him, and if, &c. This Case was argued by Calthorp for the Plaintiff, and by Germin for the Defendant. The first question was, Whether this Lease for years, be devised to Elizabeth for life, Remainder to Barthol-mew? And all the Justices (absente Richardson) resolved, That if a man hath Lands in fee, and Lands for years, and deviseth all his Lands and Tenements, the Fee-simple Lands pass only, and not the Lease for years: And if a man hath a Lease for years, and no Fee-simple, and deviseth all his Lands and Tenements: the Lease for years passeth; For otherwise the Will should be meerly void. Secondly, they all agreed, That if one deviseth his Land, which he hath by Lease, to his Executor for life, the Remainder over, that there ought to be a special assent thereto by the Executor, as to a Legacy, otherwise it is not executed: And there was not here any special assent. Thirdly, Jones and my self were of opinion, That it appears here that he had other Lands in Fee, which he devised to his wife durante viduitate: and other Lands which he devised unto her for life, the Remainder over, and then that devise may not extend to that Lease. But Berkley to the contrary; because it may be that Land devised as long as she is unmarried, is the sole Land which he had in Fee: And the other Land devised absolutely, is the Lease for years; But it was thereto answered, That the devise is unto her for life, of the Lands in Burnham and Hitcham, and clearly no part of the Lease-land extends into Hitcham; so as it is clear, it extends not to Lease-lands but to Freehold-lands. Fourthly, Richard Batyne making his wife his sole and whole Executrix, of all his Cattle, Corn, and moveable Goods, and not mentioning what shall be done concerning the residue of his Estate; whether the wife be absolute Executrix quoad all his Estate, or only particular Executrix quoad his Cattle, Corn and moveable Goods, and not quoad his Leases, and his Debts? And as touching that point we all agreed, That one may make several Executors; the one quoad things real, the other quoad things personal, and may divide their authority; yet quoad Creditors, they are all Executors and as one Executor, and may be sued as one Executor, 19 H. 8. 8. Dy. fol. 3. 32 H. 8. Br. Exec. 155. But Jones Justice and my self conceived, as this Case is, That she is sole and absolute Executrix for the whole Estate, as well Leases as Debts, and other things: For when he saith, that she shall be his sole and whole Executrix of his Cattle, Corn, and moveable Goods, it is but an innumeration of the particulars, and no exclusion of any, especially when he doth not make any other Executor for the residue: And Catalla in Latine extends to all things. And it may be intended, that so was his intent, when he made not any other Executor. But Berkley Justice conceived, that she is a special Executrix quoad the things enumerated, and no general Executrix. The fifth question

Co. 8. 94. b.

Moor 12. 1 Rol. 914.

R. 613.

stion was, Admitting that she is no absolute Executrix quoad all the Estate, but quoad the particulars specially named, and she proving the Will, and it being found, that Administration was committed unto her omnium bonorum, &c. prout antea, Whether that be a general Administration committed, or only an Administration, of the Goods whereof she was made Executrix? And Berkley held, That it is but a special Administration, because it is Bonorum jurium & creditorum prædict' *Rich. Balyne* & prædict' Testament' concernent' and that coupled to the Testament; so that it extends no further than the Will. But Jones and my self were of Opinion, That it was a general Administration committed; For Jurium & Creditorum are general words, and the word (&) should be expounded as (aut) and it cannot be tied only to the Testament; For there be not any words of Debts, as Creditorum imports: And they be as general words, as are usual in general Letters of Administration; Wherefore upon all the matter, Justice Jones and my self were of Opinion against the Plaintiff, That he should be barred. But Justice Berkley è contra per quod Adjournatur.

2 Cr. 394.

Sir Thomas Fynch *versus* Lambe. Mich. 5 Car. rot. 295.

ERror of a Judgment in the Common Bench in an Assumpsit. Supposing that the Defendant, decimo sexto Jacobi apud *Burry* in *Suff.* promised to pay, &c. After Verdict and Judgment upon non Assumpsit pleaded, and found for the Plaintiff, The Defendant brings Error, and upon diminution alledged, The original was certified Hill. quarto Caroli, upon which the Plaintiff in the Writ of Error pleads the Statute of vicesimo primo Jacobi, of limitations: And that this Action being upon a Promise in decimo sexto Jacobi, and not brought within six years after the Promise, nor within three years after the Statute, that this Action is not maintainable. The Defendant pleads, That he, secundo Caroli, which was within three years of the Statute, brought a Writ original of Assumpsit, supposed to be made in Kent against the Defendant, now Plaintiff in the Writ of Error, wherein he was Outlawed. But in tertio Caroli, the Outlawry in the Common Bench, was declared void, and he discharged. And that within a year after he brought this Action, and supposeth the Promise to be made at Bury to his damages of 600 l. And in the former Action the Assumpsit was alledged to be made in Kent to his damage of 500 l. and avers, That it was one and the same promise, and cause of Action: And upon this Plea the Plaintiff in the Writ of Error demurred, and Twisden shewed the cause to be, For that this new Action varies in the County from the Assumpsit, and in the damages alledged, and so cannot be intended one and the same cause of Action, nor to be a new Suit begun for the same matter. Also I conceived, that for as much as this Outlawry was not reversed by Error, but avoided

4. Jones 312. Siles 442.

Ante 160.

avoided

voided by Plea, the first original is not determined. But he might have proceeded thereupon; and then to begin a new Original, and in another County, is not according to the Statute of vicesimo primo Jacobi, not within the intent of the Statute. But Richardson, Jones, and Berkley held, That this variance of the County and damages is not material to the Action, being transitory, and averred to be for one and the same cause; and although the Outlawry is not reversed by a Writ of Error, but avowed by Plea, it is all one within the intent of the Statute; For the Statute is not where the Outlawry is reversed by Error, but where the Outlawry is reversed, so it is by any means. Wherefore upon these three Opinions, a Rule was given, that Judgment should be affirmed, &c. Ante 280. Co. Litt. 282. b

Eyres *versus* Taunton, Trin. 7 Car. rot. 590.

SCire facias in Chancery. Upon a Recognisance of 200 l. by one Cawley, who was returned dead; whereupon a second Scire facias issued against the Heir of Cawley, and against the Tenants of the Lands and Tenements of Cawley, which he had tempore Recognitionis vel postea: Whereupon the Sheriff returned the Defendant Taunton *Terr-tenant* of such Lands, and omitted to return any thing concerning the Heir. And upon this the Defendant pleads, That the said Cawley had nothing in the said Lands at the time of the said Recognisance, or ever after: And upon this they were at Issue in Chancery, and 'twas sent hither to be tried; and it was tried, and found for the Plaintiff, That Cawley was seised, &c. And after Verdict for the Plaintiff, Mallet for the Defendant moved in arrest of Judgment, Because nothing was returned concerning the Heir, viz. that there was not any Heir, or that the Heir had nothing: Therefore no Judgment shall be given; For it is a non-Return of the Sheriff, and not a mis-Return; and it is not aided by any of the Statutes of 32 H. 8. or 18 Eliz. or 21 Jac. of Jeofayles: The Reason he alledged that no Judgment ought to be given, was, Because the *Terr-tenant*, without the Heir, was not to be charged, and therefore the Heir ought to be summoned; And until the Heir be summoned, or that it be returned, that there is not any Heir to be summoned, or that the Heir hath not any Lands to be charged, the *Terr-tenant* ought not to be charged; For the Heir might have a release to plead, or other matter to bar the Execution; and his Land is rather to be charged than the Land of the *Terr-tenant*; For the Heir shall not have contribution against the *Terr-tenant*, as the *Terr-tenant* shall have. Also if the Heir be within age, the Paroll shall demur, and the *Terr-tenant* shall have advantage thereof; and therefore, there being nothing returned concerning him, he moved, That no Judgment ought to be given. Richardson, Jones, and Barkley held, That the Return was not good, Because the Plaintiff names and sets forth, that there is an Heir, and there is no Return quoad the Heir; so as to him it is Jones 319. 3 Cr. 896. Co. 3. 13 a.

quasi

quaſi breve album, and no Return, and is not aided by any Statutes. But I was of a contrary opinion, Becauſe the Defendant hath omitted to take advantage thereof; for having pleaded, and the Iſſue being found againſt him, he ſhall not now take advantage for not returning the Heir to be ſummoned: For it may be that there is not any Heir, or that the Heir hath no Land, or may not be found. Vid. 17 Ed. 2. Execut. 139. b. 18 Ed. 2. ibid. 142. That the *Terr-tenant* in a Scire facias ſhall not be warned until it be returned, that there be not any Heir, or that the Heir is warned, and comes not in. Vid. tertio Henrici quarti fol. decimo tertio, a Scire facias hæredi & Terretenenti. The Sheriff returns ſuch a *Terr-tenant* warned, and ſpeaks nothing of the Heir, yet the *Terr-tenant* was inforced to anſwer. And after, ad informandam Curiam, whether there was an Heir, it was ordered, That a new Scire Facias ſhould be awarded.

3 Cr. 896.

Benl. 162. Jones 87. Poph. 153. 3 Bul. 317.

Hillary, primo Caroli, The Caſe inter Bowyer & Rivett was cited by Juſtice Jones, That in a Scire facias againſt the Heir and *Terr-tenant*, he is charged only as *Terr-tenant*: and by pleading *Riens per deſcent*, and found againſt him, The Execution was of the moity of his Land, and not of all, as the Heir ſhould have been charged upon a falſe Plea. Reſid. poſt. pag. 312.

Spurſtow

Spurstow *versus* Prince.

ACtion upon the Case. By an Executor against the Sheriff, for that the Testator upon recovery, had a Fieri facias, and the Defendant made execution and levyed the Debt, and at the return of the Writ did not return it: And after the Testator died; whereupon the Plaintiff, for that *tort* in vita Testatoris and for the loss which came unto him, brought this Action: And upon Not guilty pleaded, it was found for the Plaintiff: And thereupon Glynn moved in arrest of Judgment, that this action is not maintainable by an Executor; Because it is a personal wrong done unto the Testator, for which the Executor hath no remedy; For he hath not any remedy by the course of the Common Law for such personal wrongs: And it is not maintainable by the equity of the Statute of quarto Edvardi tertii, de bonis Testatoris asportatis, and for that purpose he cited a Case, tertio Caroli, in this Court betwixt Levaston and Diskins (which Jones Justice said, he well remembred) where an Action upon the Case was brought by an Executor against a Sheriff, for suffering an escape upon mean process, in the time and at the Suit of the Testator: And because it was a personal wrong to the Testator, the action lay not for the Executor. But note no Judgment was given there, for the Court was divided therein; So here, &c. whereupon the Court would advise until the next Term. 6. 1 Rol. 913. 1 Rol 913. Jones 173. 1 Rol. 912. R. 205. Jones 173. Lat. 167.

Lutterell *versus* Lea.

DEbt, in the Common Bench, upon a Judgment in this Court. The Defendant pleaded, *Nul tiel Record*. And upon that, the Plaintiff there obtained a Cerciorari out of the Chancery, to send the Record thither, which by Mittimus might be sent into the Common Bench. And it was much doubted whether such Cerciorari were allowable; Because that Records in the Kings Bench, shall not be removed out of that Court, into any other Court: For that the Pleas here are coram Rege. And divers presidents were shewn, that such Records were by Mittimus out of the Chancery, sent into the Common Bench, viz. Hill. vicesimo primo Elizabethæ rot. 1374. In debt upon a Judgment in this Court, upon *Nul tiel Record* pleaded by Mittimus out of the Chancery, it was sent into the Common Bench, & Judgment for the Plaintiff. And Mich. vicesimo tertio et vicesimo quarto Elizabethæ rot. 2013. betwixt Leex & Scargill was such a president. And Hill. 11 Jac. rot. 3455. betwixt Palmer & Steward, Debt upon a bond to the Sheriff for appearance, He pleads, comparuit ad diem. The Plaintiff denies it, and by Mittimus out of the Chancery, it was brought into the Common Bench, & Judgment there was given. And Hill. undecimo Jacobi rot. 1715. Fylipps *versus* Mannings, such Plea & Judgment, and divers other presidents were shewn; wherefore it seemeth, that such course is well allowable, sed adjournatur. 7. R. 33. 341. 516. 4 Inst. 73. Dier 22. b. 1 Sand. 98. Pl. Knight. Had a word mis of y Court might be certified by Certiorari & Mittimus to Court of Bristo

Pp Termino

Termino Paſchæ, anno nono *Caroli* Regis, in Banco Regis.

Symms *verſus* the Lady Smith. Hill.6 Car.rot. 1066.

COvenant. For that the Defendant had covenanted, That ſhe would make a lawful ſurrender of ſuch copyhold-land, upon reaſonable requeſt, and that ſhe would permit the Plaintiff to injoy the ſaid Lands & to receive the rents quietly, without interruption. And the Plaintiff ſhews, that ſhe was a Copyholder of ſuch Lands, & alledges the cuſtome, that ſhe might ſurrender by Letter of Atturney into the hands of two Tenants out of Court: And ſhews, that he cauſed a Letter of Atturney to be made, for the ſaid Dame Smith to Seal, to give authority to ſuch two perſons named therein, to ſurrender at the next Court, and tendred it unto her to Seal; And ſhe would not ſeal it, nor ſurrender at the next Court, holden ſuch a day, and that ſhe received the rents of the ſaid Lands, for ſuch a time, and ſo brake her Covenant by not ſurrendring upon that requeſt. The Defendant pleads, that the Plaintiff tendred unto her a Letter of Atturney to ſeal; and becauſe ſhe did not know what was therein contained, ſhe required reaſonable time to be adviſed by her Counſel thereupon, and the Plaintiff refuſed to give her any time to be adviſed thereon; For which cauſe ſhe did not ſeal it: And upon this Plea the Plaintiff demurres. And being argued at the Barre by Baall for the Plaintiff, and by Beare for the Defendant. Firſt, the Court reſolved, that the breach is not well aſſigned, For ſhe is by her Covenant to make ſurrender upon requeſt, but is not bound to make a Letter of Atturney to make a ſurrender; ſo the breach is not aſſigned according to the Covenant. Secondly, It was moved, that for as much as ſhe is to make a ſurrender upon reaſonable requeſt, admitting that ſhe ought to make a Letter of Atturney, he ſhould have reaſonable time to be adviſed after requeſt; for there is difference where ſhe is to make it upon requeſt, for there ſhe ought to have done it preſently upon the requeſt, and ſhall have no time to adviſe with Counſel; But where ſhe is to do it upon reaſonable requeſt, ſhe ſhall have convenient time to adviſe thereof. But all the Court held, that there

1. Godb.445. 1 Rol.442.467. Jones 314. Stiles 107. Ant.176.

A.176.

R 466.

Ant.176.

1 Rol.442. Co.2.3.b.

was not any difference, where it is to be done upon requeſt, or upon reaſonable requeſt. Thirdly, It was moved, that it is a breach of the Covenant, becauſe ſhe did not ſurrender at the next Court. And that a requeſt to make a Letter of Attorney to ſurrender, implies a requeſt to make a ſurrender; ſed non allocatur: For it ought
1 Rol. 467. to be an expreſs requeſt to make a ſurrender, and not an implied one; wherefore it was ruled, that Judgment ſhould be entred for the Defendant, unleſs, &c.

Lancaſter *verſus* Keyleigh and Steymſon, and Steymſon his Bayle.

2. Godb. 440. Jones 325. ACtion upon the Caſe. The Plaintiff recovers againſt Keyleigh 130 l. damages in the Kings Bench, to which Action the ſaid Steymſon and Steymſon were bayle: And the Judgment being againſt the principal, and after (upon a Scire facias) againſt the bayle, Error was brought by the principal and the bayle in one Writ of Error, returnable in the Exchequer Chamber, ſuppoſing the Error to be in redditione judicii & in adjudicatione executionis ad damnum ipſorum, &c. And hereupon Sir John Banks moved, That this Record might not be removed upon this writ of Error;
2 Cr. 17 r. For the Bayle may not have a Writ of Error in the Exchequer Chamber by the Statute of viceſimo ſeptimo Elizabethæ, which
Ante 142. 286. gives this writ only in ſeven Caſes mentioned therein, and in no other; For it being a new Law which gives authority only to that Court, may not be extended larger than the Statute limits. Secondly, Though the Bayl may have a writ of Error, yet one
Poſt. 408. writ of Error lyeth not joyntly for the principal and the Bayle;
2 Cr. 384. becauſe there be ſeveral Judgments given againſt them: And the damages againſt the one is not againſt the other; wherefore they may not joyn in a writ of Error no more than Tenant for life, and he in Reverſion; or the Tenant and Vouchée may joyn. And of this opinion was all the Court.

Fruett *verſus* Drake and his Wife. Paſch. 8 Car. rot. 271.

3. Jones 315. 1 Rol 675. 1 Rol. 197. ERror of a Judgment in the Common-Bench in Dower. The Error aſſigned was, Becauſe the writ and Declaration made demand of Dower, in a Meſſuage, 160 acres Terræ, 60 Prati, 100 Paſturæ, & de communia Paſtur. pro omnibus averiis, cum pertinentiis, &c. The tenant pleads, *Ne unques ſeiſie q. Dower*, &c. and found for the Demandant; and Damages aſſeſſed, and Judgment, whereas, of Common in groſs without number, a *Feme* is not dowable: And the damages being intirely given, and Judgment accordingly, it was therefore moved by Calthorp to be Error. Rolls for the
1 Rol 675. Co. L. 30. b. 32. a. Defendant, in the writ of Error, agreed, That of common in groſs without number, a *Feme* is not dowable: But he conceived, it ſhall not be here intended to be Common in groſs, but rather appendant or Appurtenant:

purtenant: And although it was said, If it were Common Appendant or Appurtenant, it need not be demanded, but is included in the Land, cum pertinentiis, and that it is now bis petitum, yet that is no cause of Abatement of the Writ; For if he had pleaded in Abatement for that cause, it should not prejudice the Defendant; for she might have abridged her plaint; And after Judgment it is no cause to reverse it. And precedents were shewn in the Common-Bench, Pasch. 4 Car. rot. 1066. betwixt Peckham and Wickham; where in Dower the demand was in the same manner of Lands and Common; And upon pleading, Demurrer being for part, and a Verdict for part, Judgment was for the Defendant. And now being debated, all the Court seriatim delivered their opinion, That as the Case is, the Common may be intended Appendant or Appurtenant, whereof Dower is demandable; And it shall not be intended to be Common in gross without number, whereof a *Feme* is not dowable; And the rather, being after Verdict, which finds, that he was seised, quod Dower &c. And by intendment it appeared upon the Evidence, that it was such a Common as went with the Land, whereof she was dowable: And if it had been Common in gross without number, the Judge before whom the Tryal passed, would have directed it to be found against the Defendant. And therefore (it being also in case of Dower, and to affirm a Judgment) the most favourable construction shall be made: And although the words are, Et de Communia Pasturæ, &c. yet it shall not be intended, divided common; but rather an enumeration of the things demanded: And the other Judgment being in the same manner upon a Demurrer, they all agreed, that it was no Error; And therefore the Judgment was affirmed.

Baldwin *versus* Wine. Hill. 8 Car. rot. 181.

EJectione firmæ of a Lease of Tythes in Roughton by Charles Baldwin, appertaining to such a Chappel. The Ejectment supposed in taking of so many loads of tythes of Wheat and Barley, being severed from the nine parts. After Verdict upon Not guilty pleaded, it was found for the Plaintiff, and moved in arrest of Judgment by Grimston, that an Ejectione firmæ lies not of tythes only; But it may be of a Rectory, or of such a Chappel, and of the tythes thereto appertaining; so as he may be ejected of or from a thing in possession, whereof Habere facias possessionem may be, but not of Tythes only. The Court would advise. Vid. 1 & 2 Ph. & M. Dyer 116. b. 9 Eliz. Dy. 258. Co. lib. 11. fol. 25. b. 15 H. 7. 8. It being afterwards moved again, was adjudged for the Plaintiff. 4. Jones 321.

Barnaby *versus* Rigalt. Mich. 8 Car. rot. 364.

ERror of a Judgment in the Common Pleas in an Action of the Case upon an Assumpsit; and declares, upon the Custome of Merchants, 5.

Merchants, whereby, if one for wares delivered unto him or his Factor makes a Bill of Exchange, directed to a Merchant, and the Merchant to whom it is directed accept thereof, and after refuſes to pay, and this is protested before a publick Notary, that then he who delivered the Bill is bound to pay it: And alledges in facto, that the ſaid Rigalt delivered in France ſuch Wines of the value of 200 l. to Joh. Stile Factor of the ſaid Barnaby, and he thereupon delivered a Bill of Exchange for the ſaid money to J. N. who accepted thereof, and had not paid it; whereupon he brought his Action. the Defendant pleaded Non Aſſumpſit, and found againſt him, and Judgment for the Plaintiff. And Error aſſigned, Becauſe the Action is grounded upon the Cuſtome of Merchants, and doth not ſhew that the Plaintiff was a Merchant at the time of the delivery of the Bill of Exchange: But becauſe he was named to be a Merchant in the Declaration, and the Bill is for Merchandize ſold, the Court would not intend but that he was a Merchant at that time: &c. wherefore the Judgment was affirmed.

Blunden *verſus* Baugh-Hill. 7 Car. rot. 1106.

6. 1 Ro. 661. 3. Jones 115. Lat. 53.

ERror of a Judgment in the Common Bench. Baugh brought an Ejectione firmæ of Lands in Blechingley of the demiſe of Charles Earl of Nottingham, againſt Blunden. Upon Not guilty pleaded, a ſpecial Verdict was found, that anno triceſimo nono Elizabethæ, Charles, Lord Howard Lord Admiral, being ſeiſed of the ſaid Land in tayl by Indenture, covenanted, in conſideration of marriage betwixt Sir William Howard his eldeſt Son and Heir, and Elizabeth daughter and heir of the Lord St. John, to ſuffer a Recovery of thoſe Lands, to the uſe of the ſaid William and Elizabeth and the heirs males of the body of the ſaid William, with divers Remainders over. That the marriage took effect, and the ſaid William entred by the aſſent of his Father, and occupied at his will; and in quarto Jacobi, by indenture, demiſed that Land to Thomas Humphrys and John Humphrys, for twenty one years, rendring 115 l. rent: They enter and were poſſeſſed prout Lex poſtulat. And being ſo poſſeſſed, the ſaid Charles, then Earl of Nottingham, and the ſaid William then Lord Effingham, by Indenture, covenanted with Sir Robert Dormer and others (for that the ſaid Indenture of triceſimo nono Elizabethæ was not executed for the performance of the Aſſurances & uſes compriſed therein) to levy a fine of thoſe Lands, to the uſe of the ſaid William Lord Effingham and Elizabeth, for a Joynture for the ſaid Elizabeth, and to the heirs males of the body of the ſaid William, the remainder over, as in the Indenture, &c. which fine was levied accordingly, and to the uſes in the ſaid Indenture mentioned. That in nono Jacobi, the ſaid William Lord Effingham dyed without Iſſue male of his body: And that John Humphrys dyed: And that in decimo quarto Jacobi, Thomas Humphrys, being

being ſeiſed or poſſeſſed prout Lex poſtulat, by Indenture inrolled within ſix months, in conſideration of a competent ſumm of money, bargained and ſold the ſaid Lands to Charles Lord Effingham, Son and Heir apparent to the Earl, and his heirs. Charles Earl of Nottingham dyes; Charles now Earl of Nottingham, being his Son and Heir, entred. Blunden the Defendant, by the command of the ſaid Elizabeth, entred, and claimed it as her Joynture. And Charles now Earl of Nottingham, Son and Heir of the ſaid Charles Earl of Nottingham the Lord Admiral, entred, and made a Leaſe for three years to the Plaintiff, who entred; and the Defendant, as ſervant of the ſaid Elizabeth, and by her command *ouſted* him. And if ſuper totam materiam, the Court ſhould adjudge for the Plaintiff, they found for the Plaintiff; if otherwiſe, for the Defendant; And they found the ſaid Elizabeth to be yet alive. After arguments at the Barre in the Common Bench, and at the Bench, it was, by the opinion of Richardſon chief Juſtice, Hutton, and Vernon, adjudged for the Plaintiff, againſt the opinion of Harvey Juſtice, who argued ſtrongly for the Defendant. And hereupon a Writ of Error was brought, and the Error aſſigned only in the matter of Law. And it was divers times very well argued at the Barre by Littleton Recorder of London, and Serjeant Brampſton, for the Defendant in the writ of Error; and by Calthorp, and Serjeant Henden, for the Plaintiff; and afterward by all the Juſtices of the Kings Bench ſeriatim: And Jones, Berkley, and my ſelf held, that the Judgment was erroneous. The main queſtion was, whether by any of theſe acts there be a diſſeiſin committed to Charles Earl of Nottingham, nolens, volens? And if there be a Diſſeiſin, who ſhould be the Diſſeiſor and Tenant to the Freehold? And to the firſt Jones, Berkley, & my ſelf held, that the Law will not impute nor conſtrue it to be a Diſſeiſin, unleſs at the election of Charles Earl of Nottingham, when as none of the parties intended it to be a Diſſeiſin, nor to *ouſte* him of the poſſeſſion: For as Cok. Lit. 153. b. defines, A Diſſeiſin is when one enters, intending to uſurp the Poſſeſſion, and to *ouſte* another of his Freehold; And therefore Quærendum eſt à Judice, quo animo hoc fecerit, why he entred and intruded; And it is at the election of him to whom the wrong is done, if he will allow him to be a Diſſeiſor, or himſelf out of poſſeſſion. And therefore if one receives my rent, It is at my election, if I will charge him with a Diſſeiſin, by bringing an Aſſiſe or other Action, or have an Account. And if an Infant makes a Leaſe for years rendring rent, and the Leſſee enter, It is at the election of the Infant to charge him in Aſſiſe, or to bring Debt for the rent, or to accept the rent at his full age, as 7 Ed. 4. 6. and other books be. So it is if one enters, claiming as Gardian in Socage, or by Nurture, where he is not, It is at the election of the Infant to bring an Aſſiſe, or to charge him as Gardian, thereby admitting him to be in, without wrong, as 49 Ed. 3. 10. 40 Ed. 3. Accompt, 35 et 33 H. 6. 2. and many other books be. And Tenant at will is at the will of both parties; and the will ſhall not be determined

Dier 62. a. R. 228. 351. 432. &c.

Litt. Sect. 588.

Poſt. 306.

Co. Litt. 55. a.

mined by every act. Vide 28 H. 8. 62. Keleway 20 H. 7. 65. So
Co. 5. 10. a. Co. Litt. 55. b. where a *Feme* Leſſee at will takes Husband, or a *Feme* makes a Leaſe at will, and takes husband; Although the *Feme* hath put her will in her Husband, yet it ſhall not be ſaid a determination without the election of the Leſſor or Husband to the contrary, 38 H. 8. Dy. 61. Leſſee ſurrenders, and yet occupies, he is no Diſſeiſor but at the pleaſure of the Leſſor, 11. Aſſiſe 6 where a man makes a Feoffment and continues in poſſeſſion. And the common Caſe where a Copyholder makes a Leaſe for years, not warranted by the cuſtome, yet it is no Diſſeiſin; and the Law accounts it a good Leaſe betwixt Leſſor and Leſſee and all eſtrangers: And to that purpoſe
R. 432. 2 Cr. 659. 60. Bridg. 12. Benl. 103. was cited Hillary 18 Jac. rot. 792. betwixt Streat and Virrall. Ejectione firmæ brought upon ſuch a Leaſe: And upon ſpecial Verdict, adjudged for the Plaintiff, that it is a good Leaſe againſt all but the Lord. And they all relyed upon another Judgment in the point, Hill. 18 Jac. rot. 1230. betwixt Powſley and B. where one Carr bargains and ſells Land, by Indenture inrolled, to Bertram, upon condition, that upon payment of three hundred pounds at the end of three years, it ſhould be void: And that in the interim the Bargainée ſhould not meddle with the profits of the Land, the Bargainor occupies and makes a Leaſe for five years, and at the day doth not pay the money; The Bargainée doth not enter, but (the Bargainor occupying it) he deviſed that Land. And it was
2 Cr. 660. adjudged a good deviſe; But if he had been diſſeiſed, the deviſe had
Poſt. 370. been void. And here it ſhall not be intended, that the ſon intended to diſſeiſe his father, but that the Leaſe was made by the aſſent of the father: Alſo the party to whom the Leaſe is made, doth not claim any Freehold, but to have the Leaſe only, and to pay his rent, and pays the Rent accordingly; ſo there was no intent in any of the
2 Cr. 660. Poſt. 388. parties to make a Diſſeiſin, then the Law ſhall not conſtrue it to be a Diſſeiſin partibus invitis. And hereby it follows, that the Freehold remains in the Earl of Nottingham until the fine levyed by him and his ſon; and ſo the uſes well raiſed, and the Joynture well aſſured. Secondly, admitting there were a Diſſeiſin committed by
R. 354. theſe acts, the queſtion is, who is Diſſeiſor and Tenant of the Freehold? And Jones, Berkley, and my ſelf, held, That William Lord
2 Cr. 660. 3 Cr. 830. Effingham who made the Leaſe, is the Diſſeiſor and Tenant. For when Tenant at will takes upon him to make a Leaſe for years, which is a greater Eſtate than he may make, that act is a Diſſeiſin; and by this Leaſe for years made, and the Leſſees entring and paying the rent unto him, and he accepting thereof, He is in as Leſſee, and the Leſſor is the Diſſeiſor, and hath the Reverſion expectant upon
Poſt. 306. this Leaſe, And this Leaſe betwixt them, is an intereſt derived out of the Inheritance, gained by this Diſſeiſin. For if a Leſſee for years make a Feoffment, although it be a Diſſeiſin to the Leſſor, yet it is a good Feoffment betwixt them de facto, though not de jure, and the Feoffee is in the per, as 4 Ed. 2. brev. 403. 19 Ed. 2. brev. 770. 15 H. 3. brev. 878. Fitzh. Nat. Brev. 201. 8 H. 7. 6. per Fineux Temp.

Temp. Ed. 1. Counterplee de Voucher 126. & Cok. Lit. 367. a. And Warranty may be annexed to such an Estate, upon which he may vouch, as 50 Ed. 3. 12. And if such Lessee for years, or at will, makes a gift in tail, or a Lease for life, that creates a good Lease or a good gift in tail amongst themselves and all others, besides the first Lessor; and as to him they are both Disseisors, as it appears by the books 14 Ed. 4. 6. 18 Ed. 3. Issue 36. 7 Ed. 3. Issue 7. 14 Ed. 3. *Feffments & Fayts* 67. So it is where a Lessee at will makes a Lease for years, (especially it being by Indenture) it is a good Lease betwæn them, and debt lies for the Rent; and the Lessæ shall not avoid it but by an *ouster* by the first Lessor, as 21 H. 7. 26. is. And Jones cited, That 42 Eliz. betwixt Spark and Spark, it was so adjudged, Where Lessæ at will made a Lease for years, and he being *ousted* by a Stranger, brought an Ejectione firmæ, and recovered. And Hill. 16 Jac. rot. 792. betwixt Streat and Virral, the Case supra. And so it was resolved in this Court 28 Eliz. That an Ejectione firmæ lies upon a Lease made by a Copyholder not warranted by the Custome against any Stranger; and the book of 12 Ed. 4. 13. is directly to the point. So here when Lessæ for years enters according to the Lease and pays his Rent, the Freehold betwixt them shall be in Will. Lord Effingham, who made the Lease, and not in Humphrys who is only Lessee; and then the fine levied by the Earl of Nottingham and his son conveys well the Freehold, and the uses are well raised upon this fine, and the Jointure well setled; and then during her life the Earl of Nottingham hath no title to make a Lease: wherefore the Judgment ought to be reversed; and so much the rather for the great mischief which would ensue, if one who hath a Tenant at will, who makes a Lease for a small time; and the first Lessor, not knowing thereof, levies a fine for a Jointure for his wife, or to perform his will, or to other uses, &c. if he should be adjudged disseised, and as a Disseisee to levy fine which should tend to the benefit of the Lessee for years, and be adjudged a Disseisor against his intent or knowledge, as in this case is pretended, many should lose their Inheritances. In many Manors are divers Tenants at will, where the Father is Tenant at will, and after him the son enters and occupies at the will of the Lord, and is so reputed, and the Lord allows them, and never accounted them as Disseisors; if such Tenants at will make under-leases for a year, or for half a year, if the Lords of those Manors levy fines of those Manors, and this should tend to the benefit of the under-lessees, who should be reputed to the Disseisors without the intent of any of the parties, many Lords should hereby be disinherited: Whereupon they concluded, That Humphrys the Lessee was neither Disseisor nor Tenant, but only Will. Lord Effingham, and he is the Disseisor and Tenant; and the fine levied by Charles Earl of Nottingham, and William Lord Effingham his son, is a good fine, and the uses well raised, whereby Elizabeth the wife of the said Will. Lord Effingham hath good title, and the Defendant under her; wherefore the Judgment ought to be

Post. 484.

reverſed. But Richardſon chief Juſtice argued to the contrary, and continued his former opinion, That Humphreys is the Diſſeiſor, and was Tenant of the Freehold, at the time of the fine levied. And then the fine by the Earl of Nottingham (being a Diſſeiſee, and his Son William Lord Effingham adjutor to the Diſſeiſin) ſhall inure to bar the right of the Earl of Nottingham, and for the benefit of the ſaid Humphreys, according to the opinion in Cok. lib. 2. fol. 56. in Bucklers Caſe; and that he is a Diſſeiſor to the Earl of Nottingham, not
Poſt. 484. at his pleaſure, but de neceſſario; For, A Diſſeiſin is a tortious outing of any one from his Seiſin: And here this taking of the Leaſe by Humphrys from the Lord Effingham Tenant at will, and his entring by colour of the ſaid Leaſe, is a Diſſeiſin. And here is an Entry uſurpando jus alienum without conſent of the E. of Nottingham; and as Tenant at will may not grant his Eſtate, as 27 H. 6. 3. is, no more may he make an eſtate; and the Earl of Nottingham hath no Election to ſay it is no Diſſeiſin. But he agreed to the Caſe, Where an Infant makes a Leaſe for years, reſerving rent, and the
Ante 303. Leſſee enters, the Infant hath election to allow him to be his Tenant, or to be a Diſſeiſor, which is moſt for his advantage. So where one enters and claims as Gardian and occupies, the Infant may allow him either Diſſeiſor or Accomptant, which ſhall be for his beſt advantage. Secondly he held, That Humphrys is the ſole
2 Cr. 660. 3 Cr. 830. Co. Lit. 57. a. Diſſeiſor and Tenant of the Freehold; For he, by his entry, did the ſole act which made the Diſſeiſin; for the Leaſe for years is meerly a void contract: and when one enters by colour of a void conveyance, he is the Diſſeiſor, as in Crofts and Howels Caſe in Plowd. Com. 21 Ed. 3. 4. and 45. where a Gardian aſſigned Dower to a *Feme* who is not dowable, and ſhe enters, by her entry ſhe is a Diſſeiſereſs, 24 Ed. 3. 43. If one enters by colour of a void extent, it is at the peril of him who enters and takes the profits, to ſee by what right he enters. And he denied that the making of a Leaſe for years, is either an expreſs or implyed command to enter or make a Diſſeiſin. And he denied that the making of a Leaſe for years had gained the Reverſion to the Leſſor. But if Leſſee for years, or at will, makes a Leaſe
Ante 304. for life, or a gift in tail, he, by making livery, transfers the Freehold, and gains to himſelf the Inheritance, but by a nude and void contract he cannot gain the Reverſion: Whereupon he concluded, That Humphrys is the Diſſeiſor and Tenant, and that the Fine inures to the benefit of Humphrys and not to the limitation of the uſes in the Indenture, Becauſe none of the parties had any thing in the Land at the time of the fine levied; and that the Judgment ought to be affirmed. But afterwards, for the reaſons of us three, the Judgment was reverſed. Note, Sir Robert Heath, chief Juſtice of the Common Pleas, and Juſtice Crawley, Baron Denham, and Baron Trevor, agreed with this Judgment in the Kings Bench, and conceived, That it would be very miſchievous if it ſhould be adjudged otherwiſe. But Sir Humphry Davenport ſeemed to doubt whether the Leſſee for years ought not ſtrictly to be taken for the Diſſeiſor and Tenant.

Blizard

Blizard *verſus* Barn. Hill. 8 Car. rot. 816.

ACtion, for that falsò & malitiosè he ſpake of him theſe woꝛds, That the Plaintiff committed Felony, and procured him to be arreſted for Felony, and to be impriſoned for three days. The Defendant pleads Not guilty, and found againſt him generally, and damages to twenty ſhillings. And it was moved, that he might have no moꝛe coſts than damages, the damages being under foꝛty ſhillings, upon the Statute of viceſimo primo Jacobi: But becauſe there was a Pꝛeſident ſhewn quinto Caroli, betwixt Edwards and Topſall in Action foꝛ woꝛds, and foꝛ falſly and malicioufly pꝛocuring him to be endicted of Felony: and upon Not guilty pleaded and found againſt him, and damages tared but at foꝛty ſhillings; yet becauſe the Action was not foꝛ woꝛds only, but foꝛ other wꝛong whereof he is found guilty, he had full coſts awarded him. It was reſolved here to be out of the Statute. 7. Ante 163.

The Earl of Newport *verſus* Sir Henry Mildmay. Mich. 6 Car. rot. 439.

ERror, to reverſe a Judgment in a Writ of Entry foꝛ the Maꝛ noꝛ of Wanſted, againſt the Earl of Newport, where he appeared by his Gardians, the Earl of Southampton and others; wherein they vouched the common Vouchee, and Judgment giben upon his default after appearance; and the Erroꝛ aſſigned, foꝛ that Judgment is given by default, he being an Infant. And it being argued at the Barr by Sir John Banks and others foꝛ the Plaintiff in the Writ of Erroꝛ, and by Noy the Kings Atturney, and others, foꝛ the Defendant, the Court reſolved, That it was not Erroꝛ; foꝛ the Judgment is not given upon default of the Infant, but upon departure of the Vouchee in deſpite of the Court: And the Court is truſted, that they will not admit a Gardian, but ſuch as ſhall anſwer to the Infant foꝛ his loſs, if he hath any; and it is intended to be foꝛ his advantage: And common recoveries are common aſſurances of the Realm, and ought not to be ſhaken: Noꝛ is there any pꝛetence foꝛ an Infant, who appears by his Gardian, moꝛe than foꝛ any other perſon at full age: and it appears by 9 Ed. 4. 34. and by many Pꝛeſidents ſhewn in the time of Hen. 7. Hen. 8. Ed. 6. Q. M. and Q. Eliz. and King James, and in the time of this King, that ſuch recoveries have bæn ſuffered from time to time. And every Pꝛeſident is a Judgment, not ſub ſilentio, but in the Conuſance of the Court; and it would be inconvenient to avoid ſo many recoveries; and it ſtands with Law, that ſuch recoveries may be: Theꝛefoꝛe without any open argument, the Judgment was affirmed, notwithſtanding the Opinion of Cok. lib. 10. fol. 43. Mary Portingtons Caſe to the contrary. 8. 1 Ro. 731, 751 752. 2 Ro. 573. Jones 318. 2 Cr. 465, 466. R. 399. Hob. 197. 3 Cr. 472. Jones 38, 39, 40.

Sir George Symonds *verſus* Sir Michael Green and Will. Green his Son in Chancery.

9. THe Lord Keeper, being aſſiſted with Juſtice *Hutton* and Juſtice *Jones* in former hearings, and by *me* in this laſt hearing, it was decreed, That whereas Sir *William Green* was ſeiſed in Fee of the Manors of *Great-Milton* & *Little-Milton*, and the reputed Manors of *Great-Chilworth* and *Little-Chilworth* in the Parish of *Milton*, and of divers Lands in *Chilworth*, purchaſed 30 *Eliz.* of Sir *Michael Dormer*, and of other Lands purchaſed *primo Jacobi*, which one *Ives* occupied together until *tertio Jacobi*: And then in conſideration of the Marriage of Sir *Michael Green* his ſon, with one *Milleſent Reade* with whom he had 4500 l. covenants to ſtand ſeiſed of the ſaid Manors of *Great-Milton* and *Little-Milton*, and of divers particular Cloſſes, by name in *Chilworth*, and of all his other Lands, Tenements, and Hereditament to the ſaid Manors appertaining, or uſed and occupied with them, to the uſes following, *viz.* of the Manor and Premiſſes, to the uſe of himſelf for life, without impeachment of waſte; And after, of ſuch a Manor and ſome of the Cloſſes by name, To the uſe of *Anne* his wife, for her Jointure; And of other the particular Cloſſes before mentioned, To the uſe of *Milleſent* for her life, for her Jointure; And after the deceaſe of Sir *William*, *Anne*, and *Milleſent*, To the uſe of the ſaid Sir *Michael Green* and the Heirs Males of his body, with a remainder to his right Heirs: Afterward Sir *Michael Green* and Sir *William Green* joyned in a bargain and ſale of the Manors of *Milton* and *Chilworth*, and all the Lands thereto appertaining, or reputed as part of the ſame, or within the ſame; And they levy a fine by the name of *The Manors and* 10 *Meſſuages*, 600 *acres terræ*, 200 *prati*, & 700 *paſturæ*, which quantity compriſed as well the Freehold Lands as the Manors. The queſtion was, Whether the parcels of Land divided from the Manor by the Intail, and the Freehold Land lately purchaſed, ſhould paſs by this Mortgage? And they all reſolved, That the Lands intailed, which were parcel of the Manor, ſhall not be ſaid to be ſevered from the Manor: For the Freehold never being ſevered, but remaining intire in Sir *Will. Green*, during his life, ſhall paſs as parcel of the Manor at the time of the Mortgage; And that the Freehold bought in and occupied with the Manor, although it was but for two years before the Mortgage, may paſs, being ſaid and reputed parcel, and by that name: And the fine is well enough guided by the Indenture for the Manors and for the Freehold purchaſed, although they were not, in *rei veritate* parcel of the Manor; And a little time is ſufficient for the gaining a Reputation: Wherefore it was decreed, That Sir *George Symons* ſhould enjoy the Manor and the Freehold purchaſed: And that Sir *Michael Green* and his ſon ſhould make further aſſurance at the coſt of Sir *George Symons*: And that this Indenture is a ſufficient declaration of the uſes of the fine, as it was declared by all the ſaid Juſtices and by the Lord Keeper himſelf.

5 Cr. 16. Mo. 190. Dier 97. 1 Roll. 51.

Ante 57, 169.

Johns

Johns *versus* Stratford. Mich. 8 Car. Rot. 96.

DEbt, upon an Obligation of 200 l. upon condition to come to his lodging and to go with him to the Counsel at Wales. The Defendant pleaded the Statute of vicesimo tertio Henrici sexti; and that the Plaintiff is a Serjeant at Arms, attending upon the President and Counsel of the Marches of Wales, and took that Bond under colour of an Attachment out of the said Court, and so void. And hereupon the Plaintiff demurred. And it was moved by Henden Serjeant, That he was not any Officer intended within that Statute, which extends only to Sheriffs and their Bailiffs, and other Ministers and Gardians of Prisons; And Serjeants at Arms are not any of these Officers, but immediate to the Counsel of the Marches of Wales: Also the said Counsel is a Court erected of late time and since the said Statute, and cannot be intended within the Statute. And of that opinion the Court seemed to be, but did not resolve therein. But because it is shewn, That the Plaintiff made the arrest out of the Marches, that is to say, in London, which is out of the Jurisdiction, &c. then clearly this Obligation is out of the intent of this Statute: Therefore rule was given, that Judgment should be entred for the Plaintiff, &c. 10. 2 Cro. 207.

Starre *versus* Buckhold.

A Prohibition was granted upon the motion of Grimston, to stay a suit in the Arches for these words, Thou art a Drunkard, A drunken fellow, A base idle drunken fellow. Because these words tend to a temporal offence, and are punishable as a temporal offence, and not punishable in the Ecclesiastical Court. 11. Ante 285.

Termino

Termino Trinitatis, anno nono *Caroli* Regis, in Banco Regis.

Thomas Gwin and Bridget his Wife *versus* David Gwin.
Hill. 5. Car. rot. 295.

1. Godb. 448. ERror of a Judgment in the grand Seſſions in the County of Brecknock, by David Gwin, in a Quod ei deforciat, proteſtando proſequi Breve illud in forma & natura Brevis, de recto ad Communem Legem. ſecundùm formam Statuti *Rutland.* de tribus meſſuagiis, 200 acris terræ, 100 acr. prati, 60 acr. paſturæ, & 100 acr. boſci, & medietatem molendini in *Llaunyhagell*, ut jus et hæreditatem ſuam: Et unde dicit quod ipſemet fuit ſeiſitus de Tenementis prædictis et medietate prædicti molendini in dominico ſuo ut de feodo et jure, &c. Et quod tale ſit jus ſuum, offert, &c. And the ſaid Thomas and Briget ven. et defend. jus prædict. *David* & ſeiſinam, &c. And *Imparle*, &c. At the next Seſſions the Plaintiff counts ut antea verbatim: And the Defendant Bridget pleads, That ſhe majus jus habet tenendi 100 acres terræ, 30 acras prati, et 40 acras paſturæ, parcel. tenementorum modo petit. pro termino vitæ ſuæ, Reverſionem inde præfato *Thomæ* & hæredibus ſuis, quam prædictus *David* habet ad tenendum Tenementa prædicta, &c. Et de hoc ponit ſe ſuper patriam; et prædictus *David* ſimiliter. Et prædictus *Thomas* dicit, Quòd ipſe habet majus jus tenendi tenementa prædicta et medietatem prædict. molendini, cum pertinentiis, ut illa tenet, quam prædictus *David*, &c. Et de hoc ponit, &c. Et prædictus *David* ſimiliter. And the Jury found both Iſſues for the Demandant; and Judgment entred, Quod Recuperet verſus præfatos *Thomam* et *Brigettam* prædicta Tenementa & medietatem prædicti molendini cum pertinentiis tenend. ſibi et hæredibus ſuis quiete de præfatis *Thoma* et *Brigetta* et hæredibus ſuis in perpetuum, &c. And upon this Judgment a Writ of Error was brought: and becauſe the Writ of Error ſuppoſed, that the proceedings were in Curia noſtra; where it appears by the Record, that the beginning thereof was in 22 Jac. therefore the Writ of Error was abated, and a new Writ of Error brought coram nobis reſident. And upon it divers Errors were aſſigned by Mr. Prothorough: First, That the writing being a Quod ei deforciat, the proteſtation being proſequi in natura Brevis de recto, he ought to ſhew, what Writ of right; for there be divers kinds of Writs of right: But that was diſallowed. Secondly, That the defence is not well made; For in a Writ of Right there ought to

to have been a double defence, viz. the Plaintiffs right, and to maintain his own right. Thirdly, That the Defendants joyning in defence, ought not to have severed in their Pleas. Fourthly, That the Plaintiff having admitted them to plead several Pleas, and taken several Issues upon their several Pleas; hath admitted that they are several Tenants, and so hath abated his own Writ. Fifthly, Because Bridget pleads as Tenant for life for part of the Tenements, alledging the Reversion to be in Thomas, and for the residue pleads nothing, nor claims any Estate, yet Judgment is given against Thomas and Bridget and their Heirs, for all the Tenements: and so a final Judgment against the Feme for all, where she pleads but to part; and against her heirs, where she claims but for life. And this was held a manifest Error: Wherefore for this cause principally, the Judgment was reversed,

The King *versus* Sherington Talbot.

IN a Quo warranto he claims liberty of free warren in Rydge and two other Towns in the Forest of S. The Defendant disclaims to have such liberties in the said two Vills and in the Forest. But quoad his claim of warren in Rydge, he pleads, That he is seised in Fee of the Manor of Ridge, whereof the said Vill of Ridge is parcel; and that he and all his Ancestors, and all whose estate he hath in the said Manor, have had, time whereof, &c. liberty of free warren in all the said Manor, and within the Demesns thereof; Ita quod nullus fugabit any game of warren within the said Manor and Demeasns thereof sine licentia of the said Sherington Talbot. Issue was taken, That he and all those whose Estate, &c. had not free warren within the said Manor and Demesns thereof, and found for the Defendant. And now Noy, Atturney General, moved in arrest of Judgment, first, That the Plea is not good to prescribe to have warren in the said Manor and Demesns of the Manor: For although he may prescribe to have it in his own demeasns, yet he cannot prescribe to have it in the Lands of others, his Freeholders, nor ought he to prescribe to have it pertaining to his Manor: and for that purpose he cited 5 Ass. plac. That one ought not prescribe to have Turbary in anothers soil as appertaining to his Manor. Second Exception, Because it is by Prescription, Ita quod nullus sine licentia Sherington Talbot, which is impossible to be, for the time whereof, &c. But to these it was answered by Rolls, That a Prescription to have free warren in his Manor is good, as well in the Lands of the Freeholders, as in the Demeasns: For being by Prescription, it is intended, That this liberty was before the creation of the Freeholders, whose Estate was extracted out of the Demeasns of the Manor after the beginning of this Prescription. And as to the second, That the allegation thereof is not of necessity, and doth not vitiate the Prescription. Thirdly, It was moved by Grimston in arrest of Judgment, that the

2.
2 Ro. 619, 620.
Jones 320.
2 Cr. 156.
R. 640.

the trial was by Venire facias awarded from Ridge, where it ought to have been of the Manor: For Ridge is alledged to be but parcel of the Manor: And for this cauſe all the Court held it to be a Miſtrial, and not aided by any of the Statutes; And that it ought to be of the Manor, which is the greater and more notorious; wherefore a Venire facias de novo was awarded. And it was moved, Whether that were within the Statutes of Jeofayls, becauſe it concerns the King; and the Statutes have an expreſs Proviſo, That they ſhall not extend to Appeals or Endictments or Informations upon penal Laws, and cited ſome of them; But not any Quo warranto? And Richardſon, Jones, and Berkley held, that the Statutes did not extend to this Caſe, nor to Informations of Intruſion, for the King is not bound unleſs he is named. But Noy ſaid, Peradventure it ſhould be otherwiſe in caſe of a Quare impedit, where the ſuit is betwixt the party and the King.

2 Cr. 327. Ante 17. Co. 6. 14 b. Jones 320. b.

Townley *verſus* Chalenor, in the Chancery.

3. Bridg. 35.

Upon a Bill of Review to reverſe a Decree there, the L. *Keeper* required the aſſiſtance of Juſtice *Jones* (by whom the Decree was made) and of Juſtice *Hatton*, Juſtice *Berkley*, Juſtice *Crawley*, and of *my ſelf*, where the Caſe was, That *Thomas Foſter* and *Townley* being Aſſignees in truſt of a Leaſe, to the benefit of *Chaloner* an Infant, *Thomas Foſter* took all the profits, and was in arrear upon accompt 1500 l. and being unable to ſatisfie, the queſtion was, Whether *Townley* agreeing to this Aſſignment by ſealing the Counterpart thereof, and joyning with *Foſter* in acquittances of the rents for a year and half (but never more medled) ſhall be charged only for that wherein he had joyned in the Acquittances, or for all the reſidue? And it was reſolved, That *Townley*, being but a party intruſted, ſhall not be anſwerable for more than came to his hands; for it was the default of him who put them in truſt, to repoſe truſt in one who was not able to pay; and he being the party truſted, as well as *Townley*, *Townley* ſhall not be compellable to ſatisfie his defect: Wherefore it was reſolved, That that part of the Decree whereby he was charged to pay what *Thomas Foſter* could not, ought to be reverſed.

Eyres *verſus* Taunton. Cujus principium ante pag. 295.

4. IT was moved again by Mallet for the Defendant, in ſtay of Judgment. Whereas the Plaintiff the laſt Term procured a new Scire facias out of this Court directed to the Sheriff of Glocester, to ſummon the heir of Cawley, becauſe he had not made any mention in his former return of the heir; and thereupon this Writ iſſued out of the Court, Ex officio Curiæ ad informandum Curiam. And the Sheriff had returned, That Cawley had not any Lands in his Bayliwick which deſcended to his heir, nor any heir within his Bayliwick, &c. That yet no Judgment ought to be given, firſt, Becauſe

Because this Scire facias ought not to have been awarded to the Sheriff of Gloceſter; But upon a Teſtatum, that the firſt Scire facias was awarded to the Sheriff of Middleſex where the Recogniſance was firſt acknowledged; For being grounded upon a Record, he ought firſt to ſue the Scire facias there; and upon return that there is not any heir there, then to have this in another County; and he cited the book of Entries, fol. 500. and 2 Ed. 3. 20. ſed non allocatur. For true it is, the firſt Scire facias upon a Recogniſance to have execution, ought to be in the County where it was acknowledged; But when it is ſued there, and the party returned dead, it may be ſued againſt the heir or *Terr-tenant* in any County where the party ſurmiſeth he hath Land: Alſo this Scire facias is ex officio Curiæ, and in favour of the party, and there is no reaſon he ſhould take exceptions to it. The ſecond exception was taken to the return of the Writ; For it is returned that there is not any heir within his Bayliwick, where it ought to have been, that there is not any *Terr-tenant*; And that there is not any heir generally; ſed non allocatur: For the return upon the firſt Scire facias ſhews what Lands he had; And it ſhall not be intended there be more Lands when no heir is found there; and the Sheriff hath no authority to enquire into other Counties. The third exception, That the return upon the ſecond Scire facias in Chancery, whereupon the plea is pleaded and iſſue joyned, was inſufficient for the reaſons before alledged, and the tryal ill. But now all the Court agreed, Although the return had been better, if it had found who was heir, and that he was warned, or that there was not any heir in the ſaid County, yet it is well enough: For as 17 Ed. 2. tit. Execution 139. Anciently the Scire facias was only againſt the *Terr-tenant*, and the heir was not charged in the Scire facias but as *Terr-tenant*; and if the return be not good or formal, yet it is aided by the Statutes of Jeofayls; And the miſreturn or inſufficient return of the Sheriff alſo, quoad the Heir (becauſe he is not named in the return) is but a diſcontinuance, which is aided by the Statute of Jeofayls: Wherefore Richardſon, Jones, and Berkley agreed, that there was not any cauſe after Verdict to ſtay Judgment; whereto I aſſented. The fourth Exception, that it was not a good Tryal by Niſi prius; For iſſue being joyned in Chancery, and the Record delivered into the Kings Bench to be tryed, it ought there to have been tryed, and not by Niſi prius. But all the Court was againſt it: For iſſue being joyned betwixt party and party, may well be tryed by Niſi prius out of this Court, and ſo are many preſidents: Wherefore Judgment was given for the Plaintiff. Co. 3. 12. b.

Randall *verſus* Scory. Paſch. 8 Car. rot. 422.

ERror of a Judgment in the Common Bench, in a Replevin, Where the Defendant Avows for an Hariot, upon a Leaſe made by Indenture to Robert Chicheſter, his Executors and Aſ- 5. 1 Rol. 192. 2 Rol. 451. Het. 57.

signes, for ninety nine years, if the said Robert Chichester, John Bellun, & James Bellun, or any of them, shall so long live, rendring rent, and rendring and paying after the death of the said Robert Chichester, his Executors, and Assignes, his or their best Beast for an Hariot, or fifty shillings, at the election of the Lessor, his Heirs, or Assignes; and because the said Robert Chichester assigned this Lease to the Plaintiff, and after dyed, For non-payment of the Hariot after the death of the said Robert, he distrained, and Avowes, &c. The Plaintiff demands *Oyer* of the Indenture, which was entred in hæc verba ut prius. But the clause for the Hariot was, Rendring and paying to the Lessor, his Heirs, and Assignes, after the death of the said *Rob. Chichester*, *John Bellun*, & *James Bellun* & every of them, his or their best Beast in the name of an Hariot, or fifty shillings, &c. ut antea. And for this variance the Plaintiff demurres, and Judgment given for the Plaintiff, and Error thereof brought. The Error assigned was in point of Law. Rolls for the Plaintiff in the Writ of Error moved, that this is no variance, and that the Avowry is good; For the Lease being to him, his Executors and Assignes, the reservation of the Hariot, in construction of Law, is the reservation of him, his Executors, and Assignes, viz. after the death of him, his Executors, or Assignes, his or their best Beast; For it cannot be construed the best Beast of Bellun and Bellun, for they are strangers to the Deed, and have nothing to do therewith. But all the Court held, that there is a plain and manifest variance; for although the best Beast of Bellun & Bellun cannot be construed to be meant thereby, yet the reservation is not, that it shall be paid after the death of the Executors or Assignes, But only after the death of Chichester, Bellun, and Bellun; so as they are the parties after whose death the limitation of the Hariots are to be paid; and not after the death of the Executors or Assignes: Wherefore the Avowry was ill, and the Judgment affirmed.

Post. 418.

Penns Case.

6. Jones 320.

PEnn, a Fishmonger of London, was endicted at Newgate Sessions, For that he ingrossed divers kinds of Fish, viz. Smelts, Whitings, &c. ea intentione ad revenden. contra form. Statuti. Unto this he pleaded Not guilty, and the Endictment was moved hither by Cerciorari. Henden Serjeant moved in arrest of Judgment, that by the express words of the Act of 5 Ed. 6. Fishmongers, and Butchers, &c. are not said to be Ingrossers, nor within the Statute for Ingrossing, if they buy only things belonging to their Trade; for it is not the intent of the Statute to restrain them, it being necessary, & for the benefit of the subjects, that they should buy such things. But the Court held, that although they be not within the Statute for Ingrossing, yet if they Regrate & sell at unreasonable prices, they are expressly within it; and he is endicted, that he bought ea intentione ad revendendum contra formam Statuti, and is found guilty;

So

So it shall be intended that he ingrossed and did not sell at reasonable prices; and if he ingrossed and sold at reasonable prices, it ought to have been shewed to the Jury upon the evidence, as all the Court agreed, there being a Proviso contained in the Act, That one may take advantage by giving in evidence without formal pleading thereof. And for as much as he is found guilty, it shall be intended, that he ingrossed contra formam Statuti; Wherefore Rule was given, that Judgment should be for the King against the Defendant, unless other matter were shewn to the contrary upon the Monday following; at which day Grimston moved, that the Tryall was ill, because it was tryed at the same Sessions that he was endicted, which ought not to have been, but to have had a Venire facias, returnable at the next Sessions, and he relyed upon 22 Ed. 4. corone 44. sed non allocatur: For it is the usual and common course to try it at the same time the party is endicted, especially as this case is, being at the Goal-delivery and the party in prison. Vide 9 H. 8. Kelloway 159. That tryal before Justices of Goal-delivery may be the same day. Thirdly, He shewed that the entry is, that the Defendant pleaded Not guilty; Et de hoc ponit, &c. Et *Johannes Michaell* qui pro Rege sequitur similiter, &c. And it doth not appear by what authority he joyned that Issue; for the Kings Atturney, or one that is in loco suo, ought to have joyned; sed non allocatur: For the said John Michaell is the Clerk of the Peace in London, and he is an Officer known to the said Court where the Endictment was taken, and it needs not to be so mentioned in the Record; and the Court here knows it well enough: wherefore it was adjudged accordingly for the King.

Post. 340. 448

2 Cr. 502.

Porter *versus* Hutchman. Ante pag. 286.

7. ERror of a Judgment in the Common Bench, in Action upon the Case in nature of a conspiracy. The Error assigned was, Because in the Declaration it is supposed that he procured him to be endicted, and to be imprisoned until he was legitimo modo acquietatus, and doth not say (inde:) And for this cause Ward Serjeant moved, that it was Error; for it was a word of substance, and the cause whereby he entitles himself to the Action; And he said, that this Judgment passed sub silentio in the Common Bench. And that in two other such Actions brought by the same party against two others, being moved in arrest of Judgment, after Verdict it was adjudged for the Defendant. And a Record was shewn in this Court Hillar. 41 Eliz. rot. 1099. Prickets Case. Where after Verdict for the Plaintiff, this exception was moved in arrest of Judgment, and it appears upon the Roll, that no Judgment was given: And Richardson chief Justice said, that he was of Counsel with the Defendant, and for this cause only the Judgment was stayed. But Bulstrod for the Defendant shewed, that Pasch. 7 Jac. rot. 407. betwixt Bell and Gamble in the like Action upon the Case, where

2 Cr. 230.

where this word (inde) was omitted and exception taken for that cause; yet after divers motions in stay of Judgment, and divers continuances, Judgment was given for the Plaintiff. And of this opinion were Jones and Berkley, that the Judgment should be affirmed, Because it shall not be intended, but that he was acquietatus inde; and not of any other matter; and the presidents are both ways, and in the Writ of conspiracy inde is omitted; and by the same reason in Action upon the Case, the omission of inde is no cause to avoid the Judgment. But Richardson chief Justice and my self much doubted thereof by reason of those two last Judgments, and the Case of Prickett, and conceived, that the Declaration was ill for this omission; For if he were not acquietatus inde, it it is clear an Action would not lie: And therefore, being the material clause which maintains the action, the omission thereof is fatal; For A declaration shall not be aided by intendment, in the point of the action. And in the greater part of the presidents in print, the word inde is in the Declaration. Et adjournatur. Residuum postea, pag. 419.

Ante 236.

8. ERror of a Judgment in Coventry, in an Information upon the Statute of quinto Elizabethæ, for exercising the trade of an Ironmonger, not being Apprentice. After Verdict and Judgment there for the Plaintiff, the first Error assigned by Grimston was, Because by the Statute of vicesimo primo Jacobi, it is appointed, that every common Informer shall be sworn before his Information be received, That the fact was within the year before the Information exhibited, and within the same County where it is exhibited; and it doth not appear here that it was done so in this Case; sed non allocatur: For it is no parcel of the Record, but is only a direction to the Officers, that none shall be received, unless he be first sworn. The second, Because Informers cannot sue upon that Statute to have the moity; for by the express words in the Statute, the forfeiture is given to the Corporation; for the benefit of the Corporation, for relief of the Poor, and for other uses of the Corporation; sed non allocatur: For though that Statute gives one moity to the Informer and the other moity to the King, except in Corporate Towns, to whom such forfeitures are granted, it is to be understood, and so hath always been expounded, that in that Case the forfeiture given to the King belongs to the Corporation; and the Informer is to have his part still: whereupon Judgment was affirmed.

3 Inst. 193.

Mo. 886. Hob. 183.

Parker *versus* Taylor. Mich. 8 Car. rot. 366.

9. ERror of a Judgment in Beverley Court, in Debt. Where the Plaintiff declares in Debt of 20 li. viz. 11 li. upon an Obligation and 4 li. upon a Mutuatus. The Defendant pleaded quoad the 4 li. Non debet, & de hoc ponit se super Patriam et prædictus querens similiter. Et quoad the other, he demands *Oyer* of the Obligation

tion and Condition, which was read to be upon condition to pay eight pound at a day, &c. and he pleads payment at the day, Et de hoc ponit, &c. and the Plaintiff similiter, and Verdict for the Plaintiff quoad the Bond; and quoad the other for the Defendant, and Judgment for the Plaintiff; and the Error assigned was, That here is not any Issue; For the Defendant ought to have pleaded quod solvit, et hoc pararus est verificare, and the Plaintiff ought to have replyed non solvit, et hoc petit, &c. So there had been an affirmative and a negative; but as it is here, there is no Issue at all, and it is not aided by any Statute; and therefore it was prayed, That the Judgment might be reversed: But all the Court held, for as much as the Defendant pleads payme,nt et de hoc, &c. and the Plaintiff joyns with him, that the Jury shall enquire whether he hath paid, and the Jury finding, that he hath not paid, it is good enough, and aided by the Statute of Jeofayles; wherefore the Judgment was affirmed. 2 Cr.589. Ro.75. Hob.233.

Leycroft *versus* Dunker. Pasch. 9 Cor. rot. 152.

ACtion for words. Whereas the Plaintiff for twenty years had used the Trade of Merchant, and yet useth the same; and in the fifteenth year of King James used the said Trade, and went to Hamborough, and there used it until 22 Jacobi, and then returned into England, and used the Trade of a Merchant: The Defendant to scandalize him in his Profession spake these words of the Plaintiff the first of October anno 8 Car. He came a broken Merchant from *Hamborow* (innuendo) at his returning from Hamborow into England, and that I will justifie: The Defendant pleaded Non culp. and found against him, and damages 20 l. and it was moved by Grimston in arrest of Judgment, that these words be not actionable; for although it is to be agreed for saying of a Merchant, That he is broken in the present tense, action lies; for it is all one as if he had said he is a bankrupt, which is a great discredit to a Merchant; yet when he saith, that he came over a broken Merchant from Hamborow, it doth not import in it self any scandal; for he shews that he came over eight years before, and he might become a rich man and of good credit since that time: And of that opinion was Richardson chief Justice; For slander ought to be expressed and not taken by intendment or implication; therefore if one saith of a Merchant, that he was a poor man within this seven years, or of a Workman, that he was a weak Workman, and had little skill within these few years, an action lies not, for he may be rich, or a good Workman at the time of the speaking; so here, &c. for which, &c. but Jones, Berkley, and my self held, That the Action well lies, and it is not like the Cases before put; for there they do not charge him with any crime, and by intendment it may have good construction: But here he chargeth him with being once broken, Et qui semel malus semper presumiter esse malus eodem genere, or at least may have 14. Jones 321. R.253. Hut.125. 2 Cr.579. Ante 199. Yelv.153. 2 Cr.241. 622.

have an inclination thereto, And it being alledged to be spoken falsò & malitiosè, and to scandalize him in his Profession, it is a great cause of discrediting, and impairing him in his Trade, whereas their credit is the principal means of their gain: And if he intended it otherwise, or had spoken it in another sense, he ought to have shewn it by special Plea which would have excused him: But when he is charged with malicious speaking of those words, and with an intent to discredit him, and he pleads Not guilty, and found against him, that he spake maliciously, and with intent to discredit him, the Court may not otherwise adjudge; wherefore it was adjudged for the Plaintiff.

Green *versus* Lincoln.

11. 1 Ro. 47. Jones 326.

ACtion for words. Thou art a long shag-haired-murthering-Rogue. After Verdict upon Not guilty pleaded, and found for the Plaintiff, it was moved by Grimston in arrest of Judgment, that these words be not actionable; for he doth not charge him directly with the murther of any person, nor saith, that he is a Murtherer, but the words are Adjectively spoken, which manner of speaking shews that the words are of chiding, and do not aggravate but extenuate quoad the manner of speaking. But Henden Serjeant moved to have Judgment for the Plaintiff, and cited, that

R. 131. 1 Ro. 47.

in Hillar. 7 Car. rot. 728. betwixt Wilson and Meason, in the Common Bench, it was adjudged after debate, that for these words, Thou art a murthering Knave, Action lies: But he had not the Record to shew; and therefore the Court advised till the next Term; And afterwards, Mich. 9 Car. being moved again, it was adjudged for the Plaintiff.

Fish *versus* Wagstaff.

12.

ERror of a Judgment in the Court of the Marshalsey, by virtue of a new Patent. The Error assigned was, Because in the Stile of the Court it was mentioned, that the Court is holden by virtue of the Kings Letters Patents coram such persons, Judicibus nostris, ad audiendum et terminandum assignat, omnia placita personalia inter omnes personas, infra 12. leucas in Palatio Regis apud *Westmon.* et inter omnes homines de hospitio Domini Regis, tam diu quam hospitium Domini Regis est infra 12. leucas à Palatio *Westmon.* and a Patent ad audiendum et terminandum omnes causas cannot be, but it ought to be only of criminal matters. Vid. Dy. 175. And for that reason the Judgment was reversed.

Post. 558. 595. 2 Cr. 314.

Sparrow

Sparrow *verſus* Matterſock and others. Hill. 8 Car. rot.

TRespaſs. *Sur Demurrer* the Caſe was. The Sheriff returns upon an Elegit, that the party had not any Lands, but only within the liberty of St. Edmundsbury, and that J. S. Bayliff there, hath the execution and return of all writs, who enquired, and returned an Extent by Enquiſition, and that the Bayliff delivered the moity of the ſaid Land extended to the party, and that the Plaintiff by virtue of that Extent entred and intitled himſelf, and whether it were a good title for the Plaintiff, was the queſtion? Firſt, whether the Bayliff of a Liberty may make an Enquiſition and Extent upon an Elegit by warrant from the Sheriff, directed unto him? Reſolved, That he may. Secondly, When a Jury by Enquiſition finds the ſeiſin and value of the Land, whether the Jury ought to ſet out the moity for the Plaintiff, or if the Bayliff may deliver ſuch part of the Land for the moity? And it was reſolved, that the Jury ſhall extend all the Land; and the Bayliff where there is a Franchiſe, and the Sheriff (where no Franchiſe is) ſhall deliver the moities, and not the Jury; and ſo are all the preſidents; wherefore it was adjudged for the Plaintiff. 13.

Hob. 83: Co. 4. 65. b.

Termino

Termino Michaelis, anno octavo *Caroli* Regis, in Banco Regis.

Thomas Broxon and his Wife *versus* Dager and his Wife, Trin. 9 Car. rot 1152.

1. 1 Ro. 45. ACtion for these words, spoken by the Wife of the Defendant, of the Plaintiffs Wife, thou art a Witch, I will make thee come and say, God save my Mare: I was forced to get my Mare charmed for thee. After Verdict upon Not guilty pleaded, and found for the Plaintiff, Littleton Recorder of London moved in arrest of Judgment, that none of these words are actionable; for the first words, Thou art a Witch, without mentioning that she bewitched any Person, Cattle, or Goods, are too general, and no Action maintainable for speaking of them; and he cited divers presidents, that for calling one Witch generally, Action lies not, if he doth not shew what Witchcraft she committed: And of that opinion was all the Court upon the first motion: And for the second words, I will make thee say, God save my Mare, there is not implied any Witchcraft: And for the last words, I was inforced to get my Mare charmed for thee, was a fault in the Plaintiff, who would procure charming, to prevent mischief to her Mare; wherefore Rule was given, that the Judgment should be staid until, &c.

Ante 282.

King *versus* Edwards. Trin. 7 Car. rot. 992.

2. Jones 323: 1 Ro. 632. 3. EJectione firmæ. Upon a special Verdict the Case was. John Boulting and Jane his Wife being seised of the Land in question, to them and the Heirs of the body of John B. remainder to Ed. B. and the Heirs of his body, the remainder to Will. B. and the Heirs of his body, remainder to George Edwards and the Heirs of his body, the remainder to the right Heirs of the said J. B. they being so seised, the said John B. and his wife, and William B. (the third in the remainder) joyned in a feoffment with warranty, to Mathusaleh Keen; and after, the said Husband and wife levied a fine to the said Keen: Afterwards the said John Boulting died without Issue, and the said Will. B. and Ed. B. died without Issue; and in the fifteenth year of King James the said Mathusaleh Keen died, & the Land descended to Rob. Keen, who, after the death of the wife of the said J. B. entred, and let to the Plaintiff, and the Defendant by the command of the said George Edwards *ousted* him: And whether the

the entry of the said George Edwards was lawful, was the sole Question? And it was argued by Germin for the Plaintiff, and by Maynard for the Defendant. The first question was, Whether this Feoffment were a discontinuance of the Estate tail, and it was urged for the Defendant, That it is not any discontinuance; for the husband during the Coverture, having a joint Estate with his wife in the Freehold, had not any Estate tail in possession, but quasi a remainder in tail, expectant upon a joint Estate for life, and not executed; so then, not being seised of the Estate tail in possession, it cannot make a discontinuance; and to prove that, he cited Co. 3. fol. 5. Owen and Morgans Case, and Co. 2. fol. 61. Winscots Case. But as to that point Richardson, Berkeley, and my self held, That the Estate tail is in him vested and setled, and that his and his wifes Feoffment makes a discontinuance; And although it was objected, That William Boulting, the third in the remainder, joyned in the said Feoffment, so as it could not make a discontinuance, but that every of them respectively passed their Estates. All the Justices agreed, That this joyning of William is not material; for there is an intermediate remainder in tail to Edward Boulting, which is discontinued. But Jones doubted thereof, and conceived, It was not a discontinuance, because the husband was not absolutely seised of an Estate tail, during the life of his wife. The second Objection was, That if this Feoffment were a discontinuance at the Common Law, yet it is taken away quoad the wife by the Statute of 32 Hen. 8. And as it is taken away quoad the wife, so is it also quoad those in remainder after the wife, especially the wife surviving; and that the fine after the Feoffment is but by way of release, and is no such fine as is intended within the Statute; for it ought to be such a fine which at the first passed the Estate, and not a fine which inures by way of confirmation: But all the Justices agreed, That this Feoffment and fine to the same person make but one assurance; and when the wife is barred, and her Estate destroyed by the fine, that she cannot enter, those in remainder may not enter, but are in case as they were at the Common Law: And as this Case is, they all resolved, That an express discent, being found, it takes away his entry; Whereupon, by the assent of Jones, without further argument, it was adjudged for the Plaintiff. But for the first point Jones cited 38 Eliz. betwixt Worne and Webster, where it was held by the Court, It was not any discontinuance when the wife survived; but if the Husband had survived, it should have been otherwise.

Co. Lit. 182. a. B.

Co. 10. 96. a.

1 Rol. 634.

Mo. 476. Jones 324.

Sir Richard Snowde *versus* .....

3.

ACtion upon the Case. Whereas one Christmas exhibited a Bill against the Plaintiff in the Chancery, and shews what &c. and the Plaintiff had put in his answer thereto, and shews what, whereunto he was sworn, That the Defendant spake these

words of the Plaintiff, He (innuendo the Plaintiff) is forsworn in his answer to Christmas his Bill, (innuendo in his answer to the said Bill.) The Defendant pleaded Not guilty, and found against him, and damages 50 l. And it was moved in arrest of Judgment by Bramston Serjeant and Mr. Grimston, First, That he doth not shew in what point he was perjured; for there be divers Presidents, that Endictments of Perjury have bin quashed for this cause, that they have not shewn the perjury to have bin in a point material: But all the Court (Richardson absent) held it to be no good Exception; for true it is, That Endictments ought to shew the cause of the Perjury; but in an Action for words, which is grounded upon the speech of another, it cannot be enlarged further than the other spake. Secondly, Because it is not said, That he is forsworn in his answer in Chancery, nor is it averred, that there is not any other Bill nor Answer, but that which is mentioned, and there may be another Bill in another place, sed non allocatur; for when it is shewn, there was such a Bill in Chancery, and an Answer thereto, and that the Defendant spake those words, and is found by Verdict guilty of them upon that occasion, the Action well lies without other averment; for it shall not be presumed, there was any Bill and Answer in any other place; whereupon it was adjudged for the Plaintiff.

3 Cr. 507.

Post. 353.

Post. 337.

1 Rol. 42.

Dorothy Brian *versus* Cockman.

4. ACtion upon the Case for words. Whereas the Plaintiff was of good fame, and always free from adultery or fornication and other crimes, and after the death of Brian her late husband, was in communication with one Cowley for a marriage betwixt them: That the Defendant to deprive her of her fame, and to hinder her from the said marriage, spake of the Plaintiff these words, She is a whore, and her Children (innuendo her Children which she had by the said Brian late her Husband) are Frambishes Bastards, (innuendo one Nicholas Frambish.) After Verdict, upon Not guilty, and found for the Plaintiff, it was moved in arrest of Judgment by Grimston, That these words be not actionable; For, for calling Whore there lies not any Action, and to say, That her Children by her former Husband are Frambishes Bastards, is repugnant in it self; for they cannot be Bastards which were born in the time of her former Husband: But all the Court held, That the Action well lies; For to say of a Widow who is in communication of marriage with another, That she played the Whore in her former Husbands time, is a great discredit, and to say, That her Children are Bastards, (although in truth they cannot be Bastards in Law, yet in reputation they may be so) is cause of loss of her marriage, and that none will marry with her; wherefore it was adjudged for the Plaintiff.

Co. 4. 18.

Ante, 269.

Post. 436.

Edwards

Edwards *verſus* Woodden. Hill. Car. rot. 602.

REplevin. The Defendant made Conuſance as Bayliff to John Cotton; for that the place where, is twelve acres, parcel of a Meadow in Staunſted, parcel of the Manor of Staunſted, of which Manor one George Bing Eſq; was ſeiſed in his demeaſn as of fee, and ſo ſeiſed by Indenture, anno 12 Jac. granted a Rent-charge of thirty pounds to Sir Robert Heath and others in fee iſſuing out of the ſaid Manor, and that they by Indenture inroll'd within ſix Months in the Chancery, for three hundred pounds granted, bargained, and ſold that rent to the ſaid John Cotton and his Heirs; wherefore for rent arrear at ſuch a Feaſt, he made Conuſance, &c. The Plaintiff in bar of the Conuſance confeſſeth, that the Land is parcel of the Manor, and that George Bing was ſeiſed of the ſaid Manor in dominico ſuo ut de feodo, prout in the Conuſance; and that the ſaid George Bing ſo being ſeiſed, granted the ſaid rent to Sir Robert Heath and others, prout, &c. Sed quod dicit antea the ſaid George Bing aliquid habuit in the ſaid Manor, and long time before the grant of the ſaid rent, one John Leigh was ſeiſed in fee of the ſaid Manor, unde &c. and ſo ſeiſed, in quinto Eliz. deviſed that Manor to Richard Blunt for one hundred and twenty years, by virtue whereof he entred and was poſſeſſed, and ſo poſſeſſed anno 17 Eliz. granted the ſame to Thomas Blunt, who entred, and in anno 31 Eliz. aſſigned that leaſe to the ſaid George Bing, who likewiſe entred and was poſſeſſed; and ſo poſſeſſed in anno 37 Eliz. aſſigned it to Henry Bing, and that he anno 22 Jac. aſſigned it to Hammond Claxton, who entred, and was, and yet is poſſeſſed, and licenced the Plaintiff to put in his Cattel, who thereupon put in his Beaſts, and the Defendant diſtrained them, &c. Upon this the Defendant demurred, and ſhewed for cauſe; *Firſt*, That he doth not confeſs or travers the grant to Cotton. *Secondly*, That he doth not ſhew how the ſeiſin and grant of the ſaid George Bing is avoided. *Thirdly*, Becauſe the Plea is repugnant in it ſelf. And now being argued at the Bar by Rolls for the Defendant, he ſhewed, That this Plea to the Cogniſance is ill, becauſe in the Cogniſance it is pleaded, That George Bing was ſeiſed in his demeaſn as of fee, and granted that rent, &c. which is intended a ſeiſin in fee in poſſeſſion: Then when the Plaintiff confeſſed, That he was ſeiſed in dominico ſuo ut de feodo prout, it is a confeſſion of the ſeiſin of the fee in poſſeſſion: And when he afterward ſhewed a Leaſe for years by another, long time before, and that Leaſe conveyed to the Grantor of the Rent, and from him, by mean conveyances to the Plaintiff, it may be intended, That the Grantor was ſeiſed of the fee in reverſion, and not of the fee in poſſeſſion; for it is not repugnant to the former part of his confeſſion, and it is not a confeſſion of the ſeiſin alledged; wherefore he ought to have traverſed abſque hoc, That he was ſeiſed aliter vel alio modo, or

that he was ſeiſed modo & forma prout: Alſo he doth not ſhew how the fee came to the grantor after the Leaſe; alſo there is not any full confeſſion that the fee was in the Grantor. but by argument, which is not good in pleading. And for theſe reaſons it was moved, That the Bar to the Conuſance is ill, and Richardſon chief Juſtice and Jones were of that opinion upon the firſt motion: But I conceived, That the Plea is a good confeſſion and avoidance of the ſeiſin in fee alledged, and there needs not any Travers; For when he intitles himſelf to a leaſe for years precedent, yet in eſſe, which is not chargeable with this rent, and allows the reverſion in fee, expectant upon this Leaſe, to be in the Grantor; the pleading is good; for one ſeized in fee of reverſion, expectant upon a Leaſe for years, may well ſay that he was ſeized in dominico ſuo ut de feodo, for of that ſeiſin he may have an Aſſiſe; and that this Plea is good, appears in Plowd. Comment. Adams and Wroteſleys Caſe: And to ſhew how he afterwards came to the fee, lies not in the Conuſance of the Plaintiff; but he may well admit it, without prejudicing himſelf, he claiming by a precedent Eſtate not ſubject to that charge: And to take a Travers when he claims by a former Eſtate and admits it, is not neceſſary, and peradventure might be perilous unto him, as Co. lib. 6. 12. Heylers Caſe. Berkley conceived, although ſeiſin is pleaded in Dominico ſuo ut de feodo, which ſhall be intended ſeiſin in poſſeſſion as it is pleaded, yet the Plea is good in ſubſtance, becauſe he avoids the charge againſt him by reaſon of the former Eſtate; and if there be any defect therein, it is only for want of Travers, and that is but form; and not being ſhewn for cauſe, but other cauſes immaterial, it is aided by the Statute of 27 Eliz. and the Defendant ſhall not have advantage thereof: And to this opinion, for this cauſe, Richardſon and Jones ſeemed to incline; but they would adviſe, Et adjournatur.

Poſt. 494.

Poſt. 581.

John George and his Wife *verſus* Harvey.
Cujus principium ante pag. 282.

6. WAs now moved again by Rolls for the Plaintiff to have Judgment, That Action lies for theſe words, for ſaying, That ſhe is a Witch, Becauſe that all kind of Witchcraft is punishable by the Statute of primo Jacobi, and is intended to be ſuch who hath conference with a Spirit, and works by Spirits. But all the Court ſeriatim delivered their opinion, That the Action lies not for calling one Witch, without alledging ſhe hath done ſome act: But if it be ſaid, That ſhe bewitched any man or any thing, it well lies: But to ſay ſhe is a Witch generally, is not actionable; For it is a common ſaying, You are a Witch, which may be by your tongue or looks, &c. Wherefore it was adjudged for the Defendant. Vide Paſch. 17 Jac. betwixt Hawks and Auge, adjudged accordingly, and Mich. 10 Jac. betwixt Towſe and Sand.

2 Cr. 150. 1 Rol. 45. 2 Cr. 399. Ante 261. Poſt. 474. Mo. 906.

2 Cr 531. 2 Cr. 306.

Tyffyn

Tyffyn *verſus* Wingfield.

THe Record was, Queritur in placito Tranſgreſſionis pro eo quod vi & armis cæpit & chaſeavit his Cattel into the Cloſe of J. S. for which he took them damage feſant, and the Plaintiff was inforced to pay unto him 40 s. for amends per quod he ſuſtained damages, &c. After Verdict upon Not guilty, and found for the Plaintiff, Henden moved in arreſt of Judgment becauſe he did not conclude contra pacem &c. For the Bill recites, That it is placitum tranſgreſſionis; and the Declaration is vi et armis; Therefore he ought to conclude contra pacem: And becauſe it is not ſo done, it is ill in ſubſtance, and not aided by any of the Statutes of Jeofayles. But Grimſton for the Plaintiff argued, that this is an Action upon the Caſe, for the Action is not brought meerly for the taking or chaſing of his Cattel, but for an eſpecial wrong, viz. for chaſing them into another mans Soil, ſo as they were there Treſpaſſers, and he inforced to compound for this damnification. And although it be vi & armis, yet that doth not prove it to be an Action of Treſpaſs: For that may be in an Action upon the Caſe, as it is in the Earl of Salop's Caſe, Cok. lib. 9. fol. 50. And although the recital of the Bill be in placito tranſgreſſionis, yet it is not of neceſſity to be Treſpaſs only, but may ſerve for Treſpaſs upon the Caſe: And all the Court being of that opinion, It was adjudged for the Plaintiff. 7. 1 Ro. 100. l. Poſt. 377. 8. Hob. 180.

Symonds *verſus* Seabourne. Paſch. 8 Car. rot.

ACtion upon the Caſe. Whereas the Plaintiff, upon the ninth of Octob. 5 Carol. was poſſeſſed of an ancient houſe in Worceſter; and the Defendant, the ninth of October 5 Carol. was and yet is poſſeſſed of another houſe and void piece of Land adjoyning to the North part of the Plaintiffs houſe, wherein were three windows, time whereof memory, &c. by which windows the light came out of the ſaid void parcel of Land into the Plaintiffs houſe, time whereof, &c. That the ſaid Defendant maliciouſly, to deprive him of the light coming by the ſaid windows into his houſe, the ſaid ninth of October 5 Carol. erected a building in part of the ſaid void piece, and thereby ſtopped the lights coming by the ſaid windows into his houſe, whereby his houſe is totally darkned, and he much prejudiced by that ſtopping. The Defendant pleaded Not guilty, and found againſt him. And exception was taken in arreſt of Judgment That the Declaration is repugnant in it ſelf: For to ſay Adhuc poſſeſſionatus of the ſaid void piece of Land, and to ſhew the offence in erecting a building upon it, ſhews that it is not now a void piece of Land, and of this opinion was Berkley; but Richardſon, Jones, and my ſelf held, That this is good enough, and no repugnancy in the Adhuc poſſeſſionatus; for it may be that part of the 8.

the ſaid void parcel of Land is builded, and darkens his light, and part remains ſtill void; and the Declaration as to that, is but ſurpluſage, and the one part well ſtands with the other. Another Exception, Becauſe he alledgeth not any perſon in whom the Preſcription may be fixed; and the Plaintiff is but Leſſee for years, who cannot preſcribe. But it was anſwered thereto, That the time whereof, &c. is tyed to the houſe, and not to any perſonal preſcription; and being an ancient houſe and windows therein, time whereof, &c. there need not any preſcription in any perſon; wherefore it was adjudged for the Plaintiff.

Poſt. 419.
2 Cr. 152.

Baal *verſus* Baggerley. Trin. 9 Car. rot.

9. Jones 325.

ACtion *ſur* Caſe. Thou haſt forged a Privy Seal and a Commiſſion; Why doſt not thou break open thy Commiſſion? After Verdict, upon Not guilty pleaded and found for the Plaintiff, it was moved in arreſt of Judgment, That theſe words be not actionable: For he did not ſay the Kings Privy Seal, nor any Writ under the Privy Seal; and it doth not appear what Privy Seal he intended. Alſo he ſaith not what Commiſſion. And the words ſubſequent Thy Commiſſion, ſhewed that he intended a Commiſſion made by the Plaintiff himſelf. But it was anſwered thereto, That a Privy Seal is intended, the Kings Privy Seal, and being ſpoken generally, is to be intended according to the vulgar ſpeech, and intendment, and no other Seal is meant thereby, beſides the Kings: And Thy Commiſſion is intended a Commiſſion, which is ſued out under the Privy Seal. And to this opinion the Court ſeemed to incline; but Berkeley doubting thereof, the Court would adviſe. Afterward it was moved again and argued by Palmer for the Defendant, and by Calthorp for the Plaintiff: And Palmer ſhewed, That theſe words do not import in themſelves, That he ſpake of the Kings Privy Seal; for there is not any inducement, that there was any ſpeech of the Kings Privy Seal; and the words in themſelves do not import any ſlander, and they ſhall not be helped by an intendment or innuendo. And it may be, that a private perſon might have a private Seal; and the words after, ſhew the intent of the Defendant, when he ſaid Thy Commiſſion, innuendo the Commiſſion of the Plaintiff. But it was thereto anſwered by Calthorp for the Plaintiff, That the words ſhall be taken according to the vulgar opinion, and as the Auditors underſtand in their uſual phraſe, which is, that he ſpake of the Kings Privy Seal, when he ſaid A Privy Seal; and when he ſaid Thy Commiſſion, it is to be intended, the Commiſſion under the Privy Seal, which the Plaintiff ſued out: And Calthorp cited Trin. 35 Eliz. where one brings an Action for theſe words, Thou haſt forged a Writing for which thou waſt brought into the Star-Chamber: It was adjudged in the Common Bench, That the Action lies; for they be intended ſuch Writings for which one ſhall be puniſht. And all the Court ſeriatim, delivered

3 Cr. 296.

livered their Opinions, That the Action well lies; For the words be spoken maliciously, and being alledged in the Declaration that he spake them to scandalize him for forging of the Privy Seal and a Commission, and being found guilty, it shall be intended according to the vulgar interpretation, The Kings Privy Seal: The counterfeiting whereof is Treason: and a Commission shall be intended The Kings Commission under his Privy Seal: And Berkley agreed with the others. And Judgment was given for the Plaintiff. 1 Rol. 68.

Johnson *versus* Davy. Trin. 9 Car. rot. 1314.

EJectione firmæ, of six Messuages, one hundred acres of Land, three hundred acres of Pasture, &c. After Verdict, upon Not guilty pleaded, and found for the Plaintiff, Grimston moved in arrest of Judgment, That this suit is by original Writ, and the original doth not warrant the Declaration; for the original is of one Messuage and sixty acres of Land, and so varies from the original in the number of the Messuages and the Land. But Rolls for the Plaintiff said, That this shall not be intended the original, upon which the Plaintiff declared; but that there was another original which warrants this Declaration, which is now imbezel'd. And it shall not be intended to be grounded upon the Writ which is now shewn, first, Because the Writ bears teste 18 April. returnable 15 Pasch. and this Declaration is in Trin. Term. and here is no continuance upon this writ. Secondly, Because the writ is against the Defendant and a Copyholder; and in this Declaration there is no name of the Copyholder; wherefore it shall be intended, that this Declaration is grounded upon another writ now wanting. And this want is aided by the Statute of Jeofayles. And of the same opinion was all the Court, absente Richardson, and rule given for Judgment for the Plaintiff. 10. Ante 281, 290, 291. Hob. 251.

Penson *versus* Gooday. Trin. 9 Car.

Action sur le Case. That the Defendant maliciously and falsly, to deprive him of his life, spake these words of the Plaintiff, Thou hast taken out of my pocket 40 l. of my money; And I will cause thee to be indicted at the Sessions of the Peace, and to hold up thy hand at the Bar for it. Et ex ulteriori malitia against the Plaintiff at such a day after, said, He hath picked out of my pocket silver and gold. After Not guilty pleaded, and found for the Plaintiff, it was moved by Grimston in arrest of Judgment, that these words be not actionable, especially the last words; and being spoken at several times, and there lying no Action for the last words, and damages intire given, The Plaintiff ought not to have Judgment: And to prove that, he cited the Case betwixt Osborn and Middleton: And the whole Court was of the same opinion, That if the words 11. 2 Cr. 115, 343. Co. 10. 130. 1.

words spoken at any of the times will not bear an Action, and intire damages be given, There shall no Judgment be entred: And therefore the difference is, when the words are all spoken at one time, and part of them are actionable and part not, There damages shall be intended to be given only for those words which were actionable. But where words are spoken at several times, and the first be actionable, and the other not, and the Defendant found guilty of both, and intire damages given, There no Judgment shall be entred. But in this case, the first words, without question, were actionable; for he directly charges him with a Felonious taking, when he said, He would cause him to be endicted, and to hold up his hand for that cause. And they also held, That the last words being alledged to be spoken ex ulteriori invidia & malitia, have reference to the first, which is the picking of the pocket before mentioned, and so charging him with that Felony; It was therefore adjudged for the Plaintiff.

Ante 237.
3 Cr. 788.
1 Rol 576.
Moor 142.
Co. 10. 131.
1 Rol. 576.
1 R. 68.
R. 239.
R. 139.

Vesey *versus* Harris and his Wife. Hill. 8 Car. rot.

SCire Facias. Whereas the wife Dum sola fuit, recovered in the Kings Bench, in an Action upon the Case, 26 l. 13 s. 4 d. for damages and costs, and had execution of those damages, and yet is thereof possest; and whereas afterwards the said Judgment was by a Writ of Error removed into the Exchequer Chamber and there reversed and restitution awarded; and afterward she took the said Harris to husband; The Plaintiff thereupon brought this Writ to have restitution. The Defendant pleaded, That after the reversal had, and before the purchase of this Writ, he paid to the Plaintiff the said Debt and Costs of 26 l. 13 s. 4 d. absque hoc, That they be possessionati of the said money prout. And hereupon the Plaintiff demurred, because the Plea and Travers be both ill. And now it was argued at the Bar by Calthorp for the Plaintiff, and by Germin for the Defendant. And Richardson, Jones, and my self held, That the pleading of the payment is ill, because it is grounded and affirmed against the Record, And a payment being against matter of Record, cannot be a discharge unless by matter of Record. And as in a Scire Facias to have execution, payment is no plea in discharge thereof; no more is it in a Scire Facias to have restitution: And it appears by the book 20 H. 6. 24. and 21 H. 6. 15. that 'tis much doubted, whether if levied by the Sheriff upon a Fieri Facias be good plea, and at length it was ruled to be good, because it is grounded upon the Fieri Facias awarded, which he cannot withstand, and in reason therefore it should then be allowed, à multo fortiori, a bare payment is no Plea; And if it be a Plea, yet as it is pleaded, it is not good; for he doth not rely upon it, but Traverseth that which is immaterial, viz. Absque hoc that he is possessionatus, &c. which was only alledged, and not material or traversable; and by his travers, he waives his pleading of the payment, which being specially

12.
Jones 326.
2 Cr. 29.

specially shewn for cause of Demurrer, the Demurrer is good, and Judgment shall be against the Defendant. Berkeley held, that payment had been a good Plea if he had relyed thereupon, Because he avers that thereby the party is satisfied. And in divers cases matter in fact may be pleaded in discharge. As in Debt upon an Escape, he may plead, That the Plaintiff commanded him to let him out of Execution, and such like, &c. But as to the Travers, he conceived it ill, and therefore agreed with the other Justices, that Judgment should be given for the Plaintiff; And it was adjudged accordingly.

Penson and Anne his Wife *versus* Gooday. Trin. 9 Car. rot.

ACtion upon the Case. Whereas he keepeth an Alehouse being debito modo licentiatus by Justices of the Peace, That the Defendant, to scandalize the Plaintiffs wife, spake these words of her, Hang thee, Bawd (innuendo the said wife:) Thou (the said Anne innuendo) art worse than a Bawd: Thou keepest an house (Messuagium prædictum innuendo) worse than a Bawdy house: And thou keepest a Whore in thy house to pull out my throat. Upon Not guilty pleaded, and found for the Plaintiff, Stone moved in arrest of Judgment, that these words be not actionable; but agreed, That for saying one is a Bawd, and keeps a Bawdy house, action lies, because it is a temporal offence, for which the Common Law inflicts punishment. But to call one Bawd without further speaking, an Action lies not, no more than to call one Whore, which is a defamation only punishable in the Spiritual Court. And to say, That he keeps an house worse than a Bawdy house, hath not any plain intendment what he meant thereby; wherefore the Action lies not: And if it be intended, that such words should hinder Guests from coming thither, being an Ale-house, the husband only ought to have brought the Action. And as to that, the Court (absente Richardson) agreed. But for the other words they held, That the Action lies by the husband and wife, for the slander to his wife; and it is as much as if he had said, that she keepeth a Bawdy house; wherefore it was adjudged for the Plaintiff. 13. 1 Ro. 68. 2 Cr. 462. Ante 229. Post. 394. R. 34. 5.

George Minn *versus* Anthony Hynton Bayliff of the Liberty of the Dean and Chapter of Westminster. In Chancery.

THe Plaintiff declares as *Clerk of the Hamper*, in an Action upon the Case, Whereas one *Robert Treswell* 16. *Febr.* 4 *Carol* was Bound unto him in an Obligation of 100 l. which was not paid; and whereas he for the obtaining of the said debt, 12. *Martii* 5 *Car.* being Clerk of the Hamper in Chancery, prosecuted *an Attach. of priveledge*, directed to the Sheriff of *Midd.* to attach his body, *returnable* 15 *Pasch.* in Chancery, *ad respond.* the said *George Mynn in placito transgressions*, which Writ he prosecuted *ea intentione*, That 14.

the ſaid *Robert T.* ſo being arreſted upon his appearance, ſhould put in good Bayl to anſwer him to his ſaid Bill, by him to be put in, for the recovery of his ſaid Debt upon the ſaid Obligation. Which Writ afterward, *viz.* 13 *Martii* 5 *Caroli*, was delivered to the Sheriffs of *Middleſex* to execute; And that they the ſame day directed their Warrants under their Seals, to the Bayliff of the liberty of the *Dean and Chapter of Weſtminſter* to arreſt him: Which Warrant 14 *Martii* 5 *Caroli*, was delivered to the Defendant (Bayliff of the ſaid Liberty) to execute: And that he by vertue of the ſaid Warrant at *Weſtminſter*, within the ſaid Liberty, upon the 25. of *March* 5 *Car.* arreſted the ſaid *Robert Treſwell*, and had him in his Cuſtody: And that afterwards, before the return of the Writ, *viz.* 8 *April* 6 *Car.* to delay the Plaintiff of his Suit, and to defraud him of the recovery of his Debt, let him out of his cuſtody and to go at large againſt the Plaintiffs will, & had not his body at the day; And that afterward *ſe eſloynera*, and becauſe he is delayed in his Suit and loſeth his Debt, *&c.* The Defendant pleads thereto, That the ſaid *Robert Tr.* found Sureties for his appearance *Arthur Squibb* and *J.W.* And at the day of the return of the Writ the Defendant returned *Cepi Corpus*; And that before the *Habeas Corpus* to bring him to the Barr, he the ſaid *Ro. Tr.* died. *Et hoc, &c.* The Plaintiff replies, that he did not take the ſaid *Arthur Squibb* and *J.W.* Sureties for his appearance *modo et forma*: And hereupon it was demurred; And this was referred to Juſtice *Jones*, Juſtice *Berkeley*, and to *my ſelf*, to conſider of this Demurrer; and after argument, by counſel on both ſides, we reſolved, that this Declaration was not good. Firſt, Becauſe he doth not ſay of what Liberty he is Bayliff, or whether he hath execution and return of Writs: Otherwiſe there is no colour to charge him, and therefore ought to be ſpecially ſhewn. And of this opinion was *Jones*, and *I* agreed with him: But *Berkeley* doubted thereof, becauſe being Bayliff of a Liberty, it cannot be intended another Liberty; & he admits it in his Plea, by making him a warrant to arreſt. Secondly, Becauſe he alledges, that he had *an Attachment of Priviledge* to arreſt him for *Treſpaſs*, intending after his appearance to declare *in Debt*, which cannot be; For it is an abuſing the Proceſſe of the Court, nor can be ſo in any Court, but in the King Bench; and there the reaſon is, Becauſe when he appears and puts in Bayl, he is ſuppoſed to be *in cuſtodia Mareſchalli*, & declares againſt him *in cuſtodia*, &c. But ſo it is not in any other Court: Wherefore they all held, that the Declaration for this cauſe was not good, and that Judgment ought to be againſt the Plaintiff: And ſo we certified, That the Declaration was ill, and the cauſes wherefore.

Bawderok *verſus* Mackaller.

15. Poſt. 337. 2 Ro. 341.

INformation upon the Statute 31 Eliz. of Symony for the King and himſelf, ſuppoſing the Church in the Tower of London to be a Benefice with Cure of the annual value of 61 l. 13 s. 4 d. granta-

ble

able by the King, and that one such was Parson, and resigned; And that afterwards the Defendant agreed with J. S. to give him twenty pounds, if he might procure him to be presented thereto by the King, and admitted and inducted; And alledges in facto, That he procured the King to give unto him the said presentation to the said Chappel; and that he was admitted instituted, and inducted thereto; and therefore he demanded 6 l. 13 s. 4 d. being the double value, secundum formam Statuti, &c. Upon Not guilty pleaded, and found for the Plaintiff, Henden Serjeant moved in arrest of Judgment, first, that this Information is not good, Because he shews the annual value to be 6 l. 13 s. 4 d. and the Statute is, that he shall forfeit a double value; and yet demands 6 l. 13 s. 4 d. as being the double value, whereas it appears, it is not, and therefore it is ill. Sed non allocatur; For the truth of the offence being shewn, and found against him, although he demands less then he ought, yet the Information is good for the King. And it was compared to the Case of Agard against Candish, which was adjudged in the Exchequer, Where an Information was brought for him and the King upon the Statute of Liveries; And it was brought after the year, which is not good for the party, by the express words of the Statute, yet it was good for the King, and Judgment entred. Secondly, It was moved, that this being a donative of the Kings Donation, is not within the Statute of 31 Eliz. for that mentions only where one comes in by Symony, by Presentation, or Collation, &c. Sed non allocatur; Because it is within an equal mischief, against which the Statute provides, and so within the remedy thereof. Thirdly, It was objected, that this could not be within the Statute, Because the King being Donor, it cannot be intended That he presented for Symony; and the Statute is, That the Patron shall lose his presentation for that time, and the King is to have it; therefore it shall not extend to any of the Kings donations; Sed non allocatur. For Symony may be by compact betwixt Strangers, without the privity of the Incumbent or Patron, & yet within the perview of the Statute: As it was adjudged in Calvers Case in the Exchequer, as Jones cited it, where the Father of the Incumbent contracted with the Patrons Wife, to give her one hundred pounds if the Patron would present his son, the Patron or Incumbent not knowing of this contract (as it was found by especial Verdict) yet this was held to be within the Statute: So here, he giving to a Stranger 26 l. &c. is within the Statute: Whereupon rule was given, that Judgment should be entred for the Plaintiff.

R. 656.

2 Cr. 356. 499.

2 Cr. 385.

2 Cr. 533.

Chedleys Case

CHedley being endicted in the grand Sessions at Angleſey in Wales for petty Treason, a Cerciorari was prayed to remove the Endictment, and have it tryed in an adjoyning County; and the Court being moued concerning their opinions how it might

16.

1 Ro. 394. 5. 1 Vent. 146.

2 Cr. 484. 1 Ro. 395. be tryed in any other County, doubted thereof: But it appears by divers presidents, that a Cerciorari hath been awarded in such cases into Wales, by reason of the Statute of 26 Hen. 8. which allows that Endictments in cases of Felony may be enquired in the adjoyning Counties: And Jones said; that in 32 Eliz. such a Cerciorari was granted upon debate; wherefore the Court awarded a Cerciorari; and they said, when the Record was removed, they would advise how it should be tried. But afterwards it was stayed, and appointed to be argued, whether a Cerciorari were grantable.

Ante 248.

Martyn Pages Case.

17. MArtyn Page was endicted at Newgate Sessions, for that carnaliter cognovit one A. W. an Infant, under the age of ten years; And because upon evidence to the Jury at his arraignment, it was not proved, that he entred into the Childs body (but the contrary) although he very much had abused her, the Jury would not find him guilty of the Felony; whereupon by advise of Justice Jones and Justice Berkeley, who heard the evidence, and conceived it a foul fact, and fit to be punished, an Endictment of Battery, for abusing the said Infant in lying with her, was preferred, and found, and he was thereupon tried this Term at the Barre, and being found guilty, was adjudged for the misdemeanour to be committed to Prison, there to abide during the Kings pleasure, to be fined two hundred Marks, to stand upon the Pillory in Chancery Lane in Middlesex, neer the place where the fact was committed, with a paper upon his head, signifying the cause, and to be bound with able Sureties to the good behaviour during life.

Arthur Crohagans Case.

18. ARthur Crohagan an Irishman was arraigned the same day (viz. 25 Novemb.) of Treason; For, that he being the Kings Subject, upon the ninth of July 7 Car. Regis nunc, at Lysbon in Spain, used these words, I will kill the King (*innuendo Dominum Carolum Regem Angliæ*) if I may come unto him; & that in August 9 Car. he came into England for the same purpose. To this he pleaded Not guilty, and was tryed by a Jury of Middlesex, and it was directly proved by Wheeler & Elesey two Merchants, that he spake those words on Shipboard at Lysbon in Spain, in great heat of speech, with Captain Bask, and added these words, Because he is an Heretick; And for that his traiterous intent, and the imagination of his heart is declared by these words, it was held high Treason by the course of the Common Law, and within the express words of the Statute of 25 Ed. 3. And he coming into England in August last, and being arrested by a Warrant for this cause,

Dier 298. 3 Inst. 11. Co. Lit. 261. b.

Ant. 125.

most

moſt inſolently put his finger into his mouth, and ſcornfully pulling it out, ſaid, I care not this for your King, &c. all which ſpeeches and actions, though he now denyed them, yet the Jury found him Guilty; whereupon he had Judgment accordingly. He confeſſed, that he was a Dominican Frier, and made Prieſt in Spain. And although this, and his returning into England to ſeduce the liege people, were Treaſon by the Statute of 23 Elizab. yet the Kings Attorney ſaid, he would not proceed againſt him for that cauſe, but upon the Statute 25 Ed. 3, of Treaſon.

Thomas Adams *verſus* Lord Warden of the Stanneries.

19. 2 Ro. 314.

THomas Adams, by Noy the Kings Attorney, prayed a Prohibition, againſt the Lord Warden of the Stanneries in Cornwall, and his Deputy there, and againſt Richard Adams and others; For that they procured an Order and Decree for the payment of a ſumme of money unto them, without any Bill and ſummoning the Defendant to appear, and without any anſwer or ſentence of Court; ſo the proceedings were coram non Judice: And Noy ſaid, all their proceedings there ſummarily, et de plano, without any formall courſe, were illegal, and the Kings Courts ſhall take notice where they proceed irregularly, and ſhall controll them, and preſerve the Juriſdiction of the Court: And he further ſaid, that the Juriſdiction of the Stanneries is only for tinne matters, and where the perſons which ſue, or the one of them be a Tinner; Whereupon a Prohibition compriſing all this matter was drawn and granted accordingly.

Swayn *verſus* Stephens, ante pag. 245.

20. Ante 246.

IT was now moved again by Calthorp for the Plaintiff (none being there for the Defendant;) Firſt, that an Action of *Trover* is not within the Statute of Limitations of 21 Jac. But all the Court una voce over-ruled it; For although it be not particularly mentioned in the clauſe of Limitations, yet it is under the generall words of Actions upon the Caſe, and it appears expreſly, That it is ſo intended by the laſt Proviſo in the Statute, wherein Action of *Trover* is eſpecially mentioned. A ſecond queſtion was, The Defendant being beyond Seas at the time when the Statute was made, and untill primo Caroli, whether the Plaintiff is to be relieved by the equity of the Statute, although he be not within the expreſs words of the laſt Proviſo? For that provides only where the Plaintiff is over the Sea, to have his Action when he returns, if he brings his Action within the year after his return; but there is no mention, when the Defendant is over the Seas, of enlarging the time. And it was ſtrongly urged by Grimſton for the Plaintiff, that he is within the equity of the ſaid Proviſo; for it would be inutilis & ſtultus labor, to ſue one to Outlawry being beyond Seas

Seas, when it is erroneous and reverſable at his return. And of that opinion were Jones and Berkeley, that the Defendant being beyond Sea, is within the equity and intention of the Statute, as well, as where the Plaintiff is beyond Seas: But Richardſon chief Juſtice doubted thereof, and ſaid, that he would not deliver any opinion; But I conceived, that the Defendant being beyond Seas, is not within the equity of the Statute; For the Statute provided remedy where the Plaintiff is over Seas, and omitting where the Defendant, &c. did it purpoſely, and never intended to provide any remedy for him, becauſe the Plaintiff may proſecute his Suit by originall, although the Defendant be beyond Seas, unto an outlawry, which will ſhew there was not any remiſſneſs in him, which is the matter which the Law intends, and that there ſhould be a freſh proſecution: And when the Defendant reverſeth the Outlawry, the Plaintiff ſhall then know where he is, to proſecute the Suit againſt him; ſo the firſt Originall is not meerly a fruitleſs and idle labour, but thereby preſerves his Action. Thirdly, For the departure from the Declaration, &c. Richardſon, Jones, and Berkeley held, that the replication is no departure, but is purſuant to the Count, and fortifies it: But I conceived it was a departure, becauſe it varies in the matter and in the time; For the Declaration ſuppoſeth a poſſeſſion of the goods, and that, primo Martii viceſimo primo Jacobi, he loſt them, and the ſame day the Defendant found them, and the firſt of October, tertio Car. converted them, and the Plaintiff in his replication ſhews, that he the ſaid primo Martii, 19 Jacobi, delivered them to the Defendant to tranſport unto T. in Spain, and to redeliver them upon requeſt; and after ſhews, that the Defendant 21 Martii, 19 Jac. at St. T. ſold and converted them to his own uſe: So it varyes in the point how the goods came to the Defendants hands, both for the matter and time. Fourthly, they held, when it is alledged, that the Defendant returned from beyond Seas primo Caroli, and that the Plaintiff tertio Caroli required the redelivery and he refuſed; And afterward, the ſame firſt of October tertio Car. converted them to his proper uſe, it ſhall be intended, that the ſaid goods came a ſecond time to the Defendants hands, and that they being in his hands, the Plaintiff required the delivery of them, and that afterwards the ſame day, he converted them, and that upon this converſion the Plaintiff had grounded his Action, and the Plaintiff had election upon which converſion he would bring his Action and then he is clearly out of the ſaid Statute of 21 Jacobi, the Action being brought within two years after the laſt converſion, and ſo well brought. But I doubted how this Action ſhould be maintained, without ſhewing how they came to the Defendants hands, where it is allowed, that once he ſold them in 19 Jacobi, and converted the money to his proper uſe; and the allegation, that he after refuſed to deliver, and converted them to his proper uſe, without ſhewing how he came to them, cannot

Ante 246.

Ant. 257.

be

be good. But the other three Justices being against me, they gave rule, that Judgment should be entred for the Plaintiff, unless, &c.

Dike *versus* Ricks. Hill. 8 Car. rot. 704.

REplevin. The Defendant avows, for that the place where, &c. is fourteen acres of Land in Edmunton, whereof diu ante, &c. one Jerome Sugar was seised in fee, & held them in Socage, and devised them to Elizabeth his Wife for her life, and died, & that the reversion descended to Jerome Sugar his Son and Heir, and he died seised of the reversion, which descended to Anne his Sister, Wife of the said Ricks; and that the said Elizabeth died, and the said William Ricks, and Anne entred, and by the Indenture let those Lands to John Fenn, for one and twenty years, rendring 10 l. yearly rent, and he entred, And for the rent of half a year, due at the Annuntiation last past he avows. The Plaintiff in barre to this avowry, confesseth the seisin of Jerome Sugar the Father, and the tenure and devise to Elizabeth for her life, prout, &c. But he further saith, That he by the said Will appointed to the said Elizabeth his Executrix; and further devised, & appointed, that if in case it should fully and sufficiently appear, that the said Elizabeth should not find sufficient of the Goods, Chattels, and Debts, due to the said Jerome the Testator, to satisfie his Debts, and to maintain the said Elizabeth and her Children, that then she should sell all the said Tenement, or so much, as with his Goods and Debts owing him would satisfie his Debts, and maintain her and her Children: And he alledgeth, that in 43 Eliz. it sufficiently appeared to the said Elizabeth, that the said Jerome had not at the time of his death, Goods, Chattels, and Debts owing him sufficient to satisfie his, the said Jeromes Debts & to maintain the said Elizabeth & her Children; wherefore, she by Indenture inrolled in Chancery within six moneths for 160 l. bargained and sold the said Tenements to William Sugar and his Heirs; by virtue of which Bargain and Sale, and by the Statute 27 Hen. 8 of Uses, the said William Sugar was seised in fee; and afterward Jerome the Son released unto him and his Heirs, who by Fine conveyed it to the Plaintiff, and traverseth, that the said Jerome the Son, died seised of the Reversion; And thereupon the Avowant demurred. And now being argued at the Barre by Grimston, it was adjudged for the Defendant, That the Plea to the Avowry was not good; First, Because he doth not shew what was the value of the Goods and debts due unto the Testator, and what was the summe of the Debts which he owed, and what was the value of the Lands sold, so as it might appear to the Court, that she had cause of sale of the whole Land; for she had authority only to sell as much as should suffice, &c. Secondly, For that the Will, giving the authority to sell, and he pleading a Sale by Indenture of Bargain and Sale inrolled, and that by virtue thereof,

21.
1 Ro. 329. Jones 327.

1 Rol.

of, and of the Statute of 27 Hen. 8 of Uſes, he was ſeiz'd of the Reverſion, &c. it is not good; For if the Sale be good by the authority of the Will, he is not in, by the Statute, but by the Deviſe; And where it was ſaid, that this Sale ſhall be, quoad the Eſtate for life only which is transferred by the Statute, and the Reverſion was conveyed by the Will, It was held; That when ſhe took upon her to ſell, ſhe ſold the entire Eſtate and Inheritance of the Land, wherein the Eſtate for life is contained, and ſhe did not by authority of the Will convey the Reverſion only, expectant upon the Eſtate for life. And Jones ſaid, that in 22 Jac. betwixt Davie and Uiber, both theſe points were adjudged accordingly. Thirdly, It was held, That the pleading of the Releaſe is to no purpoſe, Becauſe although the Releaſe be by him and his Heirs, yet it is not a Releaſe to him and his Heirs; And when by the Bargain and Sale, the Eſtate for life of the Leſſee only paſſed, this Releaſe doth not enlarge it, to increaſe the Eſtate. Fourthly, Where it was alledged, that this Plea is an inducement to the Travers, and therefore not iſſuable; and then there needs not ſo much certainty as where the matter is iſſuable: Yet the Court held, That the Plea is not good; For an enducement to a Travers ought alwayes to be ſufficient in matter, which is not here; wherefore it was adjudged for the Avowant.

Co. Litt. 113. a.
1 Rol. 329.
Ante 265.

.....againſt the Inhabitants of the Hundred.....

22.

ERror of a Judgment in the Common Bench, in an Action upon the Statute of Winton, of Hue and Cry. The Error aſſigned was, Becauſe the Maſter brought the Action for a Robbery committed upon his Servant, and the Servant was ſworn, where it was objected by Calthorp, that the Maſter who had the loſſe ought to be ſworn; But it was anſwered by Grimſton, that the Servant ought to be ſworn and not the Maſter; For although the loſſe is to the Maſter, when his Servant is robbed of his money, yet the Servant, upon whom the Robbery was committed, is the proper perſon to be ſworn, that he was robbed, and that he knew not any of the Robbers. The ſecond Error inſiſted upon, was, Becauſe the Action is brought by the party and the King, yet neither upon the joyntiug of Iſſue, nor in the Venire facias, is there any mention of qui tam pro Domino Rege, &c. but of the party himſelf only. Sed non allocatur: For it was ſaid, that true it is, when the Action is brought upon a penal Statute, where part is given to the King, and part to the party proſecuting, there it ought to be ſo, and it is the common courſe to enter the party qui tam pro, &c. But when the King is only named, as an offence againſt the King and the party, and the King is not to have any part of the ſumme recovered, but only to have a Fine; there neither in the Iſſue

Ant. 38.
3 Cr. 142.
Ant. 256.

Iſſue nor in the Venire facias is any mention of Qui tam, &c. and ſo are all the Preſidents, as Keeling affirmed. And of that opinion was all the Court; whereupon Rule was given, that Judgment ſhould be affirmed.

Anonymus.

ACtion upon the Caſe, for theſe words, Thou haſt given *J. S.* nine pounds for forſwearing himſelf in Chancery, and haſt hired him to forge a Bond. After Verdict upon Not guilty pleaded, and found for the Plaintiff, Mallet the Queens Sollicitor and Holbourn moved in arreſt of Judgment, That theſe words be not actionable; for it is not alledged (as to the firſt words) that any ſuit was in the Chancery, or that he forſwore himſelf in his anſwer, or as a witneſs. Nor doth he ſay, That he ſuborn'd him to forſwear, Nor that he gave that unto him to forſwear himſelf, Nor that he knew that he forſwore himſelf, Nor doth ſhew any particular wherein he forſwore himſelf. And to ſay that he gave unto him nine pounds for forſwearing himſelf, may be intended, That he was inforced to pay it by reaſon of his falſe oath. Sed non allocantur; for the words are to be intended according to the uſual manner of ſpeaking, That he hired him to forſwear himſelf; And although he doth not ſhew that he was ſworn in Chancery, nor what he ſwore, it is not material; for if he never was ſworn, it is ſcandalous unto him to ſay, That he procured one to forſwear himſelf in a Court of Record, although it is meerly falſe, becauſe he never was ſworn. Secondly, to the words, That he had hired him to forge a Bond; although it is not ſaid, That he hath forged a Bond, or that it appears he hath done the Act, it is ſcandalous. And ſo held all the Court; wherefore it was adjudged for the Plaintiff.

23. Ante 322. 2 Cr. 158. Ante 140. Moor 186. 2 Cr. 158.

Mackaller *verſus* Todderick.

ERror of a Judgment in the Court of the Tower of London in Aſſumpſit, where the Plaintiff declared, That the Defendant promiſed him, in conſideration that he would procure the ſaid Mackaller to be preſented and inſtituted to the Chappel of the Tower, being a donative in the Kings gift, &c. to pay unto him twenty pounds upon requeſt. The Plaintiff alledgeth in facto, that by his labour and means the King preſented the ſaid Mackaller to the ſaid Chappel, and he was admitted, inſtituted, and inducted unto it; and that he required the payment of the ſaid twenty pounds at ſuch a day, &c. and the Defendant had not paid it. The Defendant pleaded Non aſſumpſit; and Verdict and Judgment for the Plaintiff. And now Error brought, The Error aſſigned, That Judgment was given for the Plaintiff, where it ought to be for the Defendant. And now Fletcher for the Plaintiff in the Writ of Error moved, That this Judgment was erroneous, becauſe

24. Ante 330.

he declares upon a promiſe grounded on a conſideration againſt Law; and that being the only conſideration, the Aſſumpſit is void; and for that relyed upon the Caſe of Onely, 19 Eliz. Dyer & Coke lib. 3. fol. 82. Et adjournatur. Reſiduum poſtea pag. 353. & 361.

Eliot *verſus* Skypp.

25. DEbt, for nineteen pounds, ten ſhillings, and Counts upon a Leaſe for years of certain Copyhold lands, rendring eight and thirty pounds per annum at Michaelmas and the Annunciation, by equal portions; and upon a Leaſe of certain Freehold lands in the ſaid Will, rendring twenty ſhillings per annum at the ſaid Feaſts: And for nineteen pounds for half a year of the ſaid Copyhold, due at the Annunciation laſt, and for ten ſhillings for the Freehold due at the ſame Feaſt, the Action was brought. The Defendant pleaded Non debet, and found for the Plaintiff quoad the ten ſhillings for the Freehold: And for the nineteen pounds, quoad the Copyhold rent, it was found for the Defendant. And the Clerk of the Aſſiſe returned the Poſtea, That it was found for the Plaintiff quoad ten ſhillings parcel of the ſaid nineteen pounds ten ſhillings; Et quoad the nineteen pounds reſidue of the ſaid nineteen pounds ten ſhillings, That the Defendant Non debet. And for this cauſe it was moved in arreſt of Judgment, That the Verdict is incertain, which of theſe rents was not paid. But becauſe that this Iſſue was tried before Juſtice Berkeley, and he well remembred, That the Jury found for the Copyhold rent for the Defendant, and for the Freehold rent for the Plaintiff; therefore it was ordered, That the return of the Poſtea ſhould be amended accordingly: And that then the Plaintiff ſhould have his Judgment.

2 Cr. 185. Yelv. 186.

Termino

Termino Hillarij, anno nono *Caroli* Regis, in Banco Regis.

Memorandum, That in the Vacation, betwixt *Michaelmas* and *Hillary* Term, Sir *James Weſton*, one of the Barons of the Exchequer (who was a wiſe and learned man, and of courage) died at his Chamber in the *Inner Temple*. And afterwards *Paſch.* 10 *Carol. Richard Weſton* of the ſame *Temple* was made Serjeant; and within four days ſworn Baron of the Exchequer. 1. Jones 341.

A Prohibition was prayed by Calthorp for the Parſon of W. in the County of Weſtmorland, againſt ſuing for tythe of Trouts taken in a River, becauſe they be feræ Naturæ, and ſhewed a Preſident in 5 Car. where a Prohibition was granted againſt the ſame Parſon, for ſuing for tythes of Eeles taken in the River, becauſe they be feræ Naturæ; and day was given to ſhew cauſe why it ſhould not be granted. And Richardſon ſaid, That he knew where one ſuing for Conies taken in Methold warren, a Prohibition was granted upon debate: And that in Yarmouth was a ſuit for tythes of Herrings taken in the Sea, but they could not prevail. Jones ſaid, That in his Country of Wales they uſe to pay tythes for Herrings: And in Ireland it is a common courſe to pay tythe of Salmons taken in Rivers. Richardſon ſaid, That, peradventure, may be by cuſtome; otherwiſe tythes be not payable for Fiſhes taken in Rivers. 2. 1 Ro. 635, 636. Ante 264. 1 Rol. 635.

Gobbets Caſe.

PRohibition was prayed by Bulſtrod for Gobbet, to ſtay a ſuit in the Spiritual Court, for defamation, in ſpeaking theſe words, He is a Cuckoldly Knave, and cited Preſidents, that for ſaying, He is a Knave and a cheating Knave, ſuit being in the Spiritual Court, a Prohibition was granted upon good adviſement. And the Court ſaid, That Preſident is not like to this Caſe; for there was not any offence wherewith the Spiritual Court ought to meddle; but in this caſe for theſe words, it is properly to be examined and puniſht there pro reformatione morum; for it is a diſgrace to the husband as well as to the wife, becauſe he ſuffers and connives at it; Whereupon (abſente Richardſon) it was denied to grant a Prohibition. Secondly, It was moved, That this ſhould be granted upon the Statute of 23 H. 8. becauſe he was ſued in the Court of the Arches, which is in the Archbiſhops Juriſdiction, and the words were ſpoken at Thiſtleworth in London Dioceſſe, as appeared by 3. 2 Ro. 296. Ante 111. R. 348. Ante 111. Ante 97, 162. 2 Cr. 321.

the Libel. But Jones said, That he was informed by Doctor Duck Chancellor of London, That there hath been for long time a composition betwixt the Bishop of London and the Archbishop of Canterbury, That if any suit be begun before the Archbishop, it shall be always permitted by the Bishop of London. So as it is quasi a general Licence, and so not sued there, but with the Bishops assent, and for that reason the Archbishop never makes any visitation in London Diocesse: And hereupon the Prohibition was denied.

Chapmans Case.

4: 2 Ro. 82. 96. ERror by Chapman, to reverse a Judgment against him upon an Endictment of being a common Barretor, where having traversed it in the County of Devon before the Justices of Assise there, and the Endictment found & Verdict against him, and Judgment being given, that he should pay one hundred Marks for a fine, and be imprisoned for two months, and Ideo in misericordia. The first Error assigned was, Because the Endictment is, That he was a common Barretor contra formam diversorum Statutorum, which is not good; for it is an offence at the Common Law, and there is not any Statute to punish it. Sed non allocatur; For so is the common course of Endictments. And common Barretry is an offence against divers Statutes, viz. Maintenance, and the like. The second Error, Because upon the Endictment, process being awarded, he appeared gratis at the following Assises, and pleaded Not guilty: And then a Venire Facias was awarded returnable the same Assises, and was thereupon then tried and found guilty. That this Venire Facias was misawarded to make it returnable at the same Assises, where it ought to have been returnable at the next Assises; so as there ought to have been fifteen days betwixt the Teste of the Writ and the day of the return, and not to have been made returnable the same day, Sed non allocatur; For it is the common course throughout all England: And as Rolls who moved it said, That true it is when he is in the Gaol, such a Trial may be the same Assises, But not so when the party is at large and comes in gratis. But the Court said, It is all one, and the Trial good as well in the one case as in the other. And so it is here a good Trial: Wherefore, &c. Thirdly, It was alledged for Error, because it is Ideo in misericordia, where it ought to have been Ideo capiatur, being upon Endictment for an offence finable. But it was thereto answered by Beare, That the Record is Ideo committitur Gaolæ (being there present) to remain for two months. So there needs not an Ideo capiatur, but where he is absent; for the Ideo in misericordia is but surplusage: Wherefore for this cause Curia advisare vult.

3 Cr. 148.

Ante 315.

1 Rol. 225.

Pridgeons

Pridgeons Case. Postea pag. 350.

PRidgeon was brought to the Bar upon an Habeas Corpus, and it appeared upon the return thereof, That he at Lincoln, upon complaint to two Justices of the Peace next adjoyning, was ordered to keep a Bastard Child, he being according to the said Order the reputed Father. From this Order he appealed to the next Quarter Sessions of the Peace; at which Sessions the matter being examined, he was discharged, and the former Order repealed. Afterwards at another Quarter Sessions of the Peace, the matter being re-examined, it was ordered according to the first Order, That he should be accounted the reputed Father of the Bastard, and should keep it; And that if he did not perform it, he should be apprehended and committed; and thereupon being apprehended and committed, and all this matter returned, the Court held, That he being discharged at the next Sessions, to which he appealed according to the Statute of 18 Eliz. the second Sessions hath no power to alter it: And because none were there to maintain this return, he was bailed, and day given, That if other matter were not shewn, &c. he should be discharged. 5. 2 Bul. 355. Jones 330. R. 3. 61. 62. Post. 471.

Henry Cort *versus* Episcopum Sancti Davidis, Dorothy Owen, and Thomas Pritchard. Hill. 8 Car. rot. 454.

ERror of a Judgment at the grand Sessions in the County of Pembrook, in an Assise of Darraign presentment by Henry Cort, against the Bishop of St. Davids, Dorothy Owen, and Thomas Pritchard, for the Church of Stackpoole 6. Jones 330.

The first Error assigned was, Because upon the first day, Thomas Pritchard appeared, and cast an Essoyne, but the other two made default, whereupon Resummons issued against them, returnable die Martis next following; and at the next day they cast an Essoin, which was challenged and denied. And now moved to be an Error, for that there was not idem dies given them, as there was to the first when he appeared and was Essoyned, and that there ought to have been one Essoyn allowed unto them. Sed non allocatur; For idem dies shall not be given when they make default; and after once default and resummons, an Essoyn is not allowable by the express words of the Statute of 12 Ed. 2. The second Error assigned was, Because the Count is, That he presented ad eandem, and doth not name the Church; so it is uncertain. Sed non allocatur; For the Church is first named in the Plaint, and needs not to be named again. The third Error assigned was, That Tales de circumstantibus was awarded, which ought not to be in an Assise, but upon Nisi prius, which was held a manifest Error, if it had been so; But upon view of the Record, there were not Tales de circumstantibus. Sed quod habet decem Tales secundum formam Statuti; For it is intended 2 Cr. 357. Co. 10. 105. 2.

tended by their petition, that they took their Assise in the grand Sessions, which is appointed by the Statute of 34 Hen. 8. cap. 26. The fourth Error assigned was, because the Issue being, whether Henry Core did last present one Richard Dolber the last incumbent, who was instituted and inducted upon his presentation: The Plaintiff offered in evidence Letters of Institution, which appeared to be, and so mentions that they were sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there: And those Letters were made out of the Diocess: And the Defendant had demurred thereupon, That those Letters were sufficient, and the Demurrer was denied, which Jones said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held, that the not admitting of the Demurrer ought not to be assigned for Error: For when upon the Evidence, the matter was over-ruled by the Justices of Assise, That was a proper cause of a Bill of Exceptions, and the remedy which the Statute appoints in such case; and for the matter of the Letters of Institution sealed
Hob. 89. with another Seal, and made out of the Diocess, it was held, they were good enough; for the Seal is not material, it being an Act made of the Institution: And the writing and sealing is but a Testimonial thereof, which may be under any Seal, or in any place: But of that point they would advise. The fifth Error assigned was, Because the Verdict finds the Issue for the Plaintiff; and that the Church was full of the Defendant, of the presentation of the other Defendant, per tempus semestre modo præteritum, and doth not shew when, and how long time it was void, so as it might appear to the Court. But White answered, It is good enough; for it being found by the Jury, that the value of the Church by the year was 80 l. and that it was void per tempus semestre: The Court shall intend it to be the full time of half a year, and the Judgment being only for the 40 l. is well enough. And so the Court agreed. The sixth Error assigned was, Because the Writ of admitting the Plaintiffs Clerk, is awarded to the Archbishop of Canterbury, for that the Bishop of St. Davids was a party, whereas the Justices of the grand Sessions have no power to write to the Archbishop; for they have no power to punish him if he doth not obey. And of that point the Court doubted; but it seemeth prima facie, that they may well write unto him; for it is now a Court of the Kings, and a Quare non admisit lies, if he doth not admit. But when they were the Marches in Wales, then they had no such power; and for that cause a Quare impedit did lie in the adjoyning Counties, but not so at this day: But they would advise.

Postea pag. 348.

Brett

Brett *verſus* Read.

ASſumpſit. Whereas he was indebted to the Plaintiff in 20 l. for rent arrear, in conſideration whereof he aſſumed to pay, &c. Upon Non aſſumpſit pleaded, and Verdict found for the Plaintiff, it was moved in arreſt of Judgment by Germin, That this Declaration is not good: For it is a real Contract, if it were upon a Leaſe for years; and a general Aſſumpſit, which is but an Aſſumpſit in Law, lies not for it, no more than upon a Recogniſance. Alſo it doth not appear, That it was a Rent upon a Leaſe for years, but it might be Rent-ſervice, Rent-charge, or Rent-ſeck, that is behind, which is more ſtrong againſt the Plaintiff. Grimſton moved for the Plaintiff, That the Action lies, becauſe it ſhall be intended Rent upon a Leaſe for years, which is by Contract; and then an Aſſumpſit may well be maintained upon it: And vouched the Caſe of Sir George Manſeull 17 Jac. who brought an Aſſumpſit againſt J. S. ſuppoſing, that in conſideration the Defendant might have and enjoy quietly the herbage of ſuch a Park for three years, he promiſed to pay 100 l. Adjudged, That the Action well lay, becauſe it is but in nature of Rent. But all the Court held here, That the Action lies not upon the general promiſe: But if he had alledged, That in conſideration he ſhould forbear the payment until ſuch a day, or upon ſuch a ſpecial conſideration, then the Action would lie; but not upon a general Aſſumpſit, for the reaſons before alledged; and the Caſe cited may be good Law; For it is a ſpecial promiſe to permit him to enjoy. And it was not a Leaſe, nor for Rent upon a Leaſe; Wherefore it was here adjudged for the Defendant. 7. Jones 319. 1 Rol. 8. Moor 340. 2 Cr. 506. 598. Poſt. 415. Hob. 284. 1 Rol. 8. 3 Cr. 67. 2 Cr. 590

Lord Haſtings *verſus* Sir Archibald Douglaſs.
Trin. 8 Car. rot. 1331.

ACtion *ſur Trover & Converſion*, as Adminiſtrator of Serjeant Davies, for divers Jewels. Upon Not guilty pleaded the Jury found for part Not guilty: For other Jewels, That he is guilty; And for forty five great Pearls, and forty five ſmall Pearls and a Diamond Chain, they found a ſpecial Verdict, That Serjeant Davies was poſſeſſed of them, and being ſo poſſeſt, made his Will, and thereby deviſed the uſe and occupation of all his Plate, Hangings, and Jewels to Dame Elionor his wife, during her widowhood, She giving good Security to my Daughter *Lucie*, Lady *Haſtings*, to deliver and leave the ſame to my ſaid Daughter *Lucie*, at the day of her death or ſecond marriage, which ſhould firſt happen. That he died poſſeſt of thoſe Jewels, And that after his death, the Adminiſtration of the Goods of the ſaid Sir John Davies, was committed to the Plaintiff, That the ſaid Elionor, the wife of Sir John Davies, was the Daughter of the Lord Audley, Earl of 8. 1 Rol. 911, 912

of Castlehaven, and that she in the life of Sir John Davies used the said Jewels, Et ut ornamenta corporis sui usually wore them. That afterwards the said Elionor married with the Defendant, and that he converted those Jewels, &c. And if the Court shall adjudge for the Plaintiff, they find for the Plaintiff and damages 370l. and if not, for the Defendant. Upon this special Verdict, it was argued at the Bar by Germin for the Plaintiff, and by Calthorp for the Defendant; And now this Term, it was openly argued at the Bench; and Berkeley and Jones argued for the Defendant, That she being the Daughter of a Noble-man, and permitted to use them frequently, ut ornamenta corporis sui, and they being convenient for her degree, she should have them as her Paraphernalia; and when there be not debts to be paid (as it doth not appear there were any) she shall have them against the Executors or Administrators of her husband, and that the husband cannot dispose of them from his wife, by his Will, but instantly by his death, the possession of them being in the wifes custody, the property is vested in her, and the husband cannot give them away; and that is of necessity and for conveniency in the Law; For it is not reasonable the husband should leave her naked of those Jewels which she usually did wear, and are fit (according to her calling) to wear: And it appears by Lynwood, that the wife against her husbands will, hath such an interest in Goods which are her Paraphernalia, that her husband hath nothing to do with them; but she may make a Will of them in her husbands life time, and may dispose of them in vita Martiti invito Marito: But they said; this is not allowable in our Law, that she should dispose of them in her husbands life time, but when the husband doth not dispose of them, they are instantly vested in the wife: And although the husband may make a gift of them in his life time, yet he cannot make a Will of them, to dispose, &c. And compared it to the Case, where a *Feme* hath a terme, and takes *Baron*, he may give and dispose thereof in his life time, but he cannot dispose of it by his Will; as in the Case of Bransby and Grantham; and the Case of Blacebridg, Plowd. 416. and in the Case primo Henrici quinti, Executor 108. The King may give the Jewels of his Crown by Letters Patents, but he cannot by his Testament dispose of them. And Berkeley said, That this permission of the wife to wear them usually, is as a gift of them unto her by her husband, and compared it unto the Case of 11 Hen. 4. 83. Where one takes my Son and cloaths him, or my Wife and cloaths her, it is as it were a gift of the said Apparel unto them: And as by the Custome of London, and in some places in Wales (as Jones said) the wife shall have the moity of the Goods, whereof her husband dies possessed, yet her husband in his life time may give all the goods, but by his Will he cannot prejudice her, concerning her part; wherefore he concluded, that she should have them notwithstanding the Will. And Jones said, that by the Civil Law, as the condition to tie her from marriage,

1 Rol. 911.

Moor 216.

Co. Litt. 300. 351. a.

Pl Com 525.

Moor 214.

marriage, so the limitation to have these Jewels during her Widowhood, is void, because she is absolutely possessed of them; whereupon they concluded, that Judgment ought to be given for the Defendants. But Richardson chief Justice and my self argued to the contrary, and that this is a good Will, and that she may not take them, but according to the Will: But if the Husband had not made a Will, but had left them to the disposition of the Law, & the question had been betwixt the Executor or Administrator and the wife, where there be not any Debts or Legacies to be paid, or where there be *Assets* to pay all Debts and Legacies besides those Jewels; there peradventure, the Law will allow her to take and enjoy them as her Paraphernalia: But where the Husband hath made a will and limited, how she shall have them, she ought to take them as the Husband appointed, and his will is as good, and as well to be performed as his gift in his life time; and that it is not like unto the Case of 11 Hen. 4. 83. for there it is a good gift to the Son and to the *Feme*, by the Ravisher, and the husband may well assent unto them. So are the Cases 11 H. 4. 12. & 34 Hen. 6. 10. That goods dedicated to the service of a Chappell or Church are a good gift to the Wardens of them in Law; but this permission by the husband for the wife to weare them, cannot be a gift of them in Deed nor in Law; For the husband cannot give ought to the wife, they being both but one person in Law. And as to the objection, That although an husband may dispose of them by Act in his life, yet he cannot by his will. It was answered, True it is, that a man who hath a thing real in anothers right as a terme; although he may give, yet he cannot devise it, as Plow. 192. in Bracebridges Case. So where an Executor makes a gift of goods, which he hath as Executor, it is a good gift; but a devise of them is not good, because he hath them *in auter droit*: But of all Chattells personal, although the wife had them before marriage, the absolute property by the marriage is vested in the husband, and he may give them in his life, or dispose of them by his will: So of those goods which are termed Paraphernalia, the absolute property is in the husband; and therefore he may well devise them. And to the Cases, that the husband may by gift of all his Goods, bona fide, prevent his wife, that she shall not have any part of them, notwithstanding the custome in London, Wales, and elsewhere, yet by his will, if he deviseth them, it shall not frustrate what she ought to have by the Custome, they agreed to be good Law; for Custome is another Law, and instantly by the death of the husband, fixeth the interest in the wife: But the goods which she claims as Paraphernalia be not given to the wife, but those which are of necessity and convenience for her; And when the husband leaves her what is for her necessity (viz.) necessary Apparell, he may well make a disposition of the residue, by his Will. And for that purpose was cited 19 Hen. 6. 14. A *Feme* for her *Quarentine* may have her living de communi, but she may not take any

Moor 216.

Co. Litt. 351.

Co. Lit. 300. a. 351. a.

thing, unleſs for neceſſity. And where the Civil Law ſaith, That ſhe may make a Will in the life of her Husband of her Paraphernalia, yet the Common Law (whereby we are to be guided) is expreſly contrary to it; that ſhe may not make a Will of any goods but with her Husbands Aſſent, and then it is as his own guift: But of an obligation or things in action, a Wife may make Executors by aſſent of her Husband, and may make her Husband her Executors, as appears by the Books 4 Hen. 6. 31. 39 Hen. 6 27. 3 Ed. 3. Deviſe 12. 26 Ed. 3. 71. and the intereſt, and poſſeſſion, and property of ſuch goods as are called Paraphernalia, are in the Husband, and he may deviſe them to his wife; And that ſhe ſhall take them by the Deviſe, appears 33 Hen. 6. 31. where he deviſed to his wife her Apparel, and ſhe juſtifies the taking of them by the deviſe and delivery of the Executor, 37 Hen. 6. 28. That ſhe ought to take only her neceſſary Apparell, 1 Eliz. Dyer 166. 18 Ed. 4. 11. 12 Hen. 7. 23, & 24. That the property and poſſeſſion of thoſe Goods be in the Husband, and ſhe may not make a will of them without her Husbands aſſent. And a Caſe was cited in the Exchequer, Trin. 28 Eliz. betwixt the Lord Treaſurer and others Executors of Vicount Bindon, againſt Mary Vicountes Bindon, in an Action of *Trover & Converſion*, of Jewels of the value of 1000 l. ſhe pleads to all, beſides ſuch Jewels (which were a Chain and Bracelets, not exceeding the value of 160 l.) Not guilty: And as to them, ſhe pleads, that ſhe was the wife of Viſcount Bindon at the time of his death, and ſhe uſually wore thoſe Jewels as Ornaments of her body, and averrs, that the Executors had *Aſſets* to ſatisfie his Funeralls, and all his Debts and Legacies, beſides thoſe Jewels; and Iſſue was taken, That they had not *Aſſets* to ſatisfie all the Debts and Legacies, beſides thoſe Goods; ſo thereby it is to be obſerved, that Jewels of 160 l. for a Viſcountes were not allowable for Paraphernalia: And it was anſwered, although here in this caſe, the Defendant be the Daughter of an antient Baron of this Realm, and of an Earl in Ireland, yet being married to Serjeant Davies, ſhe ought to have them as his wife: And there is not any neceſſity ſhe ſhould have a Chain of Diamonds, and the ſaid ſixty five great Pearls, and the ſixty five ſmall Pearls, which are things hanging looſe, and are not in any Chain or Bracelets; and they be not for any neceſſity for Ornament or for covering. But quacunque via data, the Husband having expreſly diſpoſed of them by his will, ſhe may not againſt his will take them without the aſſent of the Adminiſtrator, and without delivery, and not of her own head detain them, without entring ſecurity: And where it is alledged, that in the Civil Law a condition to reſtrain a ſecond marriage, is not allowed: This is no condition, but a limitation only, and it is reaſonable ſhe ſhould take accordingly. And it was alledged, that this is not any deviſe of thoſe Jewels, but only the uſe and occupation of the Plate, Hangings,

1 Rol. 211.

2 Leon. 166.

ings, and Jewels, during her Widowhood and no absolute gift of them, as is, in 37 Hen. 6. 30. the Case of the Grayle, and Plowd. in Weldens Case: And they concluded, That it is a good disposition by the will, and a declaration of his intent, and takes away that, which otherwise she might claim by the Law; and his express declaration controlls any implied gift, as is pretended. And for as much as she hath not performed it, the limitation is determined, and neither she nor her Husband can have them; wherefore they concluded for the Plaintiff.

The King *versus* Bagshaw.

INformation by Fletcher for the King and himself against Bagshaw, and demands 22 l. upon the Statute of 5 Eliz. for occupying the Trade of a Goldsmith not being an apprentice to that trade. The Defendant pleaded the Custom of London, That one being an Apprentice for seven years, and made Freeman of London, of any Trade, may use any other Trade in the same City; and shews, that he was bound an Apprentice in the Art of the Coordwyners, and served therein for seven years, and was made Freeman of London, whereby he justifies, &c. The Kings Attorney demurs thereupon, and it was argued divers times at the Barr; First, Exception to the manner of the Plea, because he pleads quod uti possit any other Trade, and not quod usus fuit; and for that, was relyed upon 22 Ed. 4. 8. Prescription, quod possit Turner son Plough. And doth not say, that he hath used to turn, &c. is not good. But it was thereto answered by Grimston, That this being alledged by way of Custome in the City, and not as a particular Prescription, is well enough; for peradventure it is a thing intended, and so not used in facto: And in proof thereof was cited 21 Ed. 4. 28. old Book of Entries 141. pleading, That every Citizen and Freeman may devise in Mortmain, allowed to be good: And to that opinion the Court inclined. Secondly, The matter of the Plea is not good, because Custome cannot be alledged against a Statute: But it was thereto answered, that being the Custome of London (which Customs are confirmed by Parliament) it shall be good. But thereof the Court doubted, and delivered not any opinion, because the Kings Attorney this Term waived the Demurrer, and took Issue upon the Custome, and prayed that the Defendant might rejoyn: whereupon the Defendant moved now by Rolls, That he might waive his Plea, and plead Not guilty. But the Court doubted whether he should be received, without the assent of the Attorney General; wherefore they would advise: And afterwards the Attorney being moved, would not assent; whereupon he rejoyned, &c.

9. Sty. 479. 2 Cr. 85.

Co. 8. 126. a. Post. 516.

Ante 291.

Post. 361.

Cort *verſus* the Biſhop of St. Davids, ante pag. 341

10. WAs now moved again by Noy Atturney General, and he principally inſiſted, that the Verdict was not good; and the Jury had not well inquired, becauſe they did not find when the Church became void, but ſaid in their Inquiry quod tempus ſemeſtre modo tranſivit, which may be long time before the Writ brought. But all the Court, ſeriatim, delivered their opinions. That the Verdict is good; and it is not neceſſary to find when the Church became void. But modo tranſivit ſhall be intended, That the ſix moneths paſſed hanging the Writ, which is onely inquirable in reſpect of the damages. And when here the value of the Church is inquired and found of the annual value of 80 li. and that the Defendant Pritchard is found to come in ex preſentatione of the Defendant Owen: So the Patron and Incumbent are named in the Writ; Although the Defendant may be in for ſix moneths by the ſame Patron which was named before the Writ brought, he ought to be removed. And the Judgment is for forty pound, which is the moity of the value; therefore the iniquiry and the Judgment are good enough, And for all the other errors aſſigned, The Court allowed none of them; And although the preſidents be, that in the Declaration he declares, Et unde dicit quod ipſe (idem the Plaintiff) ad eandem Eccleſiam preſentavit, and here omits the words ad eandem Eccleſiam; Yet becauſe it cannot have any other intendment, but that he preſented to the ſame Church mentioned in the Plaint. And the words after, That he was admitted, inſtituted, and inducted in eadem, which referrs to the Church mentioned in the Plaint; Therefore it was held good enough: Whereupon Judgment was affirmed.

Farewethers Caſe.

11. A Certiorari was awarded to the Juſtices of Aſſiſe of the County of Suff. to remove an Endictment of Common Barretry againſt one Fayrwether, a Juſtice of Peace of the ſaid County: And the Endictment being removed and the Defendant traverſing it, and rule given for tryal thereof at the Barr, and that the Defendant ſhould bear the charges of the witneſſes, becauſe the Record was removed at the Defendants Suit, Noy the Kings Atturney moved, That it ſhould be tried in the County by Niſi prius, Becauſe otherwiſe divers witneſſes would not appear to proſecute by reaſon of the charge and trouble; and that the King hath his election in what Court and in what manner he will trie his Suits. But the Court conceived, Becauſe it concerned a Juſtice of the Peace, who peradventure might have incurred the diſpleaſure of many, by reaſon of his diligent executing his Office: And for that it is a cauſe

cause which will require great examination, & is not fit, by reason of the shortness of time, to be tried at the Assises by Nisi prius; therefore they denied his motion, and held it convenient it should be tried in Banco. And divers presidents were cited of one Awsten and of one Whystler and others, where, in such case, Trials were in Banco. But the Kings Attorney said, those were by consent, which was denied: And Keeling Clerk of the Crown said, That divers presidents have been of such Trials upon Endictments in Banco, without any consent of the parties, and against the will of the Prosecutors, and in more remote Counties. And the Court said by the Statute of Nisi prius it is appointed, That Trials shall be in Banco, where the causes magna indigent examinatione, as this case doth. But if the King will signifie his pleasure, that they shall be tried by Nisi prius, it is fit he should be obeyed. Yet not upon suggestion of the parties only. Afterward the King by his Letters signified his pleasure, that it should be tried by Nisi prius. 27 E. 3. 4. 12 E. 2. 3.

Viscount Dunbarrs Case.

Note, All the Justices & Barons were assembled at *Serjeants-Inne* in *Chancery-lane*, by the Kings command, upon a question concerning the King, in a case prosecuted by Doctor *Chambers* against Viscount *Dunbarr*: Where a Fee-farm, due to the King out of the Lands of the Viscount of *Dun.* being arrear for divers years, was omitted our the charge by the connivance or negligence of the Clerk, wo ought to have put it in charge, & so continued untill the Pardon of 21 *Jac.* Whether it were discharged by the Pardon: And it was resolved that it was not; For it is a Debt to the King; & the omission of a Clerk shall not prejudice him, as also because it is excepted by the Pardon; if not by the words, at leastwise in the intent. 12.

Peck *versus* Ambler. Mich. 9 Car. rot. 348.

Assumpsit. Whereas the Defendant, primo Caroli, promised the Plaintiff, that he should enjoy such Lands in possession, and that he would save him harmless concerning any Action and Suit against him for them, that he was *ousted* of the Possession by Meddlecourt 1 Jul. 3 Car. and that a good recovery was had against him in an Ejectione firmæ 2 Car. wherein he was condemned in damages and costs seven pounds; by reason whereof he feared to be arrested: And that, upon 1 August. 7 Caroli, he gave unto him notice thereof, and required him to discharge him of that Judgment, and save him harmless from it; And that the Defendant had not discharged the Judgment, whereby he remained subject thereto, and durst not go about his business, to his damages, &c. the Defendant pleaded the Statute of 21 Jac. of Limitations, that this *ouster* was upon a Judgment in Trin. 2 Car. and the notice and request in July 2 Car. so more than six years after the cause 13. Jones 329.

cauſe of action, and before the Action brought; and traverſeth the *ouſter* in July 3 Car. or any time after July 2 Car. And hereupon the Plaintiff demurred. And now Whytfeild for the Defendant moved, that the Plea made good the matter alledged, becauſe the breach was before the ſix years. And to that opinion the Court inclined. But becauſe he failed in the other part of the breach of the Aſſumpſit, viz. in not ſaving harmleſs, but ſuffering the Judgment to remain in force, and by reaſon thereof he was endangered to be arreſted, which part is not anſwered; therefore the Plea was held ill: For by the Judgment he is damnified, although it be not alledged, that Execution is ſued, he being ſubject to the Execution and in danger to be charged. And although the Defendant be a Stranger to this Suit wherein damages and coſts are given, and therefore ought to have notice; yet when notice is given unto him thereof, he ought to procure him to be diſcharged; and therefore the Plea is ill on that part; And the Demurrer being general, Judgment is to be given for the entire Aſſumpſit againſt him; and it was therefore adjudged for the Plaintiff. And Jones and Berkeley held, that if a man aſſume to pay fifteen Quarters of Malt in five years, every year ten Quarters, If he fail of the payment of any of them, an Aſſumpſit lies, and he ſhall recover damages for all which is arrear, and for all the reſidue of the five years: But I doubted thereof. But for the principal we all agreed.

Co. 5. 24.

fifty

Ante 241. Dier 113. a.

Margaret Harts Caſe.

14. MArgaret Hart brought an Action in the Sheriffs Court in London, againſt another Woman, for ſaying, that ſhe was an arrant Whore, and went from Chamber to Chamber playing the Whore. This was removed by Habeas Corpus into this Court and Bayle put in. Stone moved for the Plaintiff, to have the Cauſe remanded, Becauſe for theſe words Action lies not here. But they were actionable there by the Cuſtome of London, becauſe ſhe is there puniſhable for ſuch offence. But the Court denied to grant a Procedendo, and ſaid an action lies not for theſe words; but that ſhe ſhould be ſued for Defamation in the Spiritual Court only.

Poſt. 394. Poſt. 487. Co. 4. 18. a.

The Caſe of Pridgeon. Ante pag. 341.

15. WAs now moved again by Grimſton. And all the Court, Richardſon chief Juſtice being preſent, delivered their opinions ſeriatim, That the Order in the firſt Seſſions was concluding; and the Order in the laſt Seſſions was meerly void: For the Statute of 18 Eliz. cap. 3. appointing, that upon Appeal to the Seſſions from an Order of two Juſtices of the Peace, their Order ſhall binde him who is adjudged to be the reputed Father; and he in this caſe having appealed to the Seſſions, and they making an Order in Court, that Order is finall, and no other Seſſi-

Poſt. 471.

ons

ons nor authority may meddle therewith. And to prove this Jones said, It was resolved by all the Justices of England upon conference, in the case of one Andrew Windsore, upon the Statute of 43 Eliz. of charitable Uses, If an appeal be upon an Order of the Commissioners of charitable Uses, to the Lord Keper, and he by Decree confirm the Order, that confirmation is perpetually binding; and there cannot be a Bill of review thereof. So it hath been resolved, where, upon the Statete of 37 Hen. 8. for Tythes in London, if a Judgment be given by the Lord Major, and upon an Appeal to the Lord Keeper that Judgment be affirmed, &c. the party is concluded, and shall not have aid by Bill of review; whereupon all the Court here resolved, that the second Order made at the second Sessions was meerly void, and his commitment unlawfull; wherefore he was absolutely discharged. And it was held, That the Statute of 3 Carol. doth not aid this Case; for the Statute there is, that if the two next Justices of Peace make not provision for the Bastard, the Justices of Peace at their Quarter Sessions shall settle an Order for keeping of the Bastard, as the two next Justices ought; but it doth not give more power or authority, nor gives authority to one Sessions, to alter that which in a former Sessions was ordered. Jones 147. Ante 40. Ante 40.

Wickham and others *versus* Enfeild and Elizabeth his Wife.
Mic. 8 Car. rot. 66.

ERror of a Judgment in Dower, by Wickham and others, against Enfeild and Elizabeth his Wife, late the Wife of William Symms, which she demanded as her Dower of the Lands of Will. Symms her former husband. The Defendant pleaded *Nunques accouple in loyal Matrimony*: Issue *quod fuit accouple in loyal Matrimony*, and thereupon a writ was awarded to the Bishop, who certified, that she was accoupled in vero Matrimonio cum prædicto *Willielmo*, sed clandestino; & quod *Willielmus* & *Eliz.* thori & mensæ participatione mutuo cohabitaverunt usque ad mortem prædicti *Willielmi*: And upon this certificate Judgment was given for the Demandant: And the Error assigned, that there was not a Writ original nor warrant of Atturney for the Defendant. But, upon diminution alledged, the writ was certified: But for the Warrant of Atturney, because it was not assigned of Record that diminution might be alledged, it was held it was not now assignable. The second Error assigned, Because the Writ of view, upon view demanded, was awarded and returned, and nothing indorsed thereupon, that the Sheriff delivered the view. But because he afterwards appeared and pleaded, he shall not now have advantage thereof. Also the Court said, It was good enough without the Sheriffs name indorsed upon it. Thirdly, it was alledged for Error, that there was neither day nor place of the Marriage mentioned in the Bishops Certificate. Sed non allocatur; For the day 16. 1 Rol. 591. 2 Cr. 6. 2 Cr. 142. Ante 190.

or

or place of the Marriage is not materiall: For it is not Iſſuable, becauſe the Certificate from the Biſhop is concluding. The fourth Error was aſſigned ore tenus by Puleſton, of Counſell with the Plaintiff, in the writ of Error, that this Certificate is not good; for it doth not anſwer to the words in the Iſſue, which are *quod ne unques accouple in loyall Marriage*, & he ought accordingly to have anſwered, Quod fuit copulatus in legitimo Matrimonio. And he doth not anſwer to the words in the Iſſue; but Quod vero Matrimonio, ſed clandeſtino copulati fuerunt, &c. For, That it was a true Matrimony, and that they lived together at Bed and Board, is but argumentative, that they were lawfully married. Sed non allocatur; For vero Matrimonio, although clandeſtino copulati fuerunt is as good as legitimo Matrimonio, for they be all one in intendment, although they be not the ſame words; and although it be clandeſtino, it doth not vitiate the Marriage. And when it is added, that Thori & menſæ participatione durante vita, the ſaid Will. and Eliz. cohabitaverunt, that proves they continued as husband and wife during his life, and it is not now to be queſtioned; wherefore the Judgment was affirmed.

Sharps Caſe.

17. ONe Sharp was indicted of Perjury upon the Statute of quinto Elizabethæ: For that whereas one Henry Damport was ſeiſed in Fee of a Manor in Sheapſide in the County of Leiceſter, whereof one great waſte, containtaining two hundred acres lying betwixt ſuch a River on one ſide, & ſuch a Brook on the other ſide, was parcel. And whereas there was a ſuit in the Chancery betwixt the ſaid Henry Damport and the Earl of Rutland, and a Commiſſion iſſued under the great Seal for the examination of divers witneſſes; and one interrogatory was exhibited whether he knew the parties? And ſecondly, whether he knew the ſaid parcel of waſte in queſtion? And if it were the Soil and Freehold of the Earl of Rutland and parcel of his Manor of Sheapſide, or not? He being examined upon theſe interrogatories before the ſaid Commiſſioners, falſly, voluntarily and corruptly depoſed upon his oath, That it was the Soil and Freehold of the ſaid Earl of Rutland, and parcel of his Manor of Sheapſide; ubi revera it was not the Soil nor Freehold of the ſaid Earl of Rutland, nor parcel of his Manor of Sheapſide; but parcel of the Manor of the ſaid Henry Damport in Sheapſide, and ſo committed wilfull and corrupt perjury againſt the Statute of 5 Eliz. And Babington moved to quaſh the Edictment, and that it was ill, Becauſe he doth not ſhew what was the Iſſue in Chancery, nor that this Land was there in queſtion, nor it doth not appear that it tended to the proof or diſproof of the Iſſue, ſo as it might be a damage to the Plaintiff. And of this opinion Ant. 322. were Richardſon chief Juſtice, and my ſelf. And although the interrogatory mentions it to be the Land in queſtion, it is not ſhewn how

how it is in queſtion, and there can be no Endictment upon this Statute, but where it is ſhewn, That the depoſition is upon the matter in queſtion, and conducing to the Iſſue, and the party thereby prejudiced. And Richardſon ſaid, It is uſual in the Star-chamber to diſmiſs Bills, if it be not ſhewn what was the Iſſue and how the perjury conduced thereunto, and how in prejudice of the party. Jones doubted whether the Endictment were good in reſpect of this exception; but becauſe it was an odious crime, he wiſhed the Defendant to plead Not guilty, and to try it; and upon the Evidence it would appear whether it were pertinent, and what was the Iſſue, which ought to be proved. But Berkeley held it to be good enough; for it would be too prolix to ſhew the Bill and anſwer, and what was the Iſſue. And in as much as it is alledged, there was a Suit betwixt them in the Chancery, and the interrogatory is, Whether he knew the Land in queſtion? which ſhews that the Land was in queſtion, and a convenient certainty is mentioned, it ſufficeth: Otherwiſe he agreed it was not good; Wherefore it was adviſed, there being two Endictments, he ſhould plead to the one, and ſo try the truth, and the Exception ſhould be ſaved. 3 Inſt. 167. Ante 322.

Mackaller *verſus* Todderick. Cujus principium ante pag. 337.

WAs now moved by Gybbs for the Defendant in the Writ of Error, That the conſideration is good; for it is for his ſolicitation and labour in procuring him to be preſented, which in it ſelf is no Symony, nor cauſe to avoid the Contract. And admitting it were Symony, yet not being an offence at the Common Law, nor triable by courſe of the Common Law (but an offence only made by the Canons) It was not puniſhable at the Common Law, until the Statute of 31 Eliz. And therefore in Mich. 40 & 41 Eliz. in the Common Bench, it was adjudged, That where an Obligation was for the payment of money, and the Defendant pleaded it to be made for the performance of a ſymoniacal Contract, and ſhews how; upon Demurrer it was adjudged, That it was meerly a ſpiritual offence, whereof the Common Law did not take any cogniſance, and therefore was no plea to avoid the Bond. And in 8. Jac. betwixt Taverner and Smith, in an Information upon the Statute of 31 Eliz. it was reſolved, That he ought to ſuppoſe a corrupt Contract, and not a ſymoniacal Contract: And the Statute doth not make the Obligation and Contract for Symony to be void, as the Statute of 13 Eliz. of Uſury, and the Statute of 23 Hen. 6. for Sheriffs. Fletcher to the contrary, for Symony hath always by the Law of God and of the Land, been accompted a great offence: and an Aſſumpſit or Bond, with a condition to pay a ſum of money for a ſymoniacal Contract, is accounted againſt Law, and void; As if one ſhould promiſe another ten pounds to beat ſuch a man, it is void, 2 H 4. 9. An obligation with a condition to ſave harmleſs 18. Moor 564. 3 Cr 685.

concerning imbezeling of a Writ and not returning thereof, is void, becauſe againſt Law. Richardſon ſaid, He much doubted thereof, becauſe the promiſe is, To pay ſo much for his labour and travail, & not for the Preſentation. Et adjournatur, reſiduum poſtea pag. 361.

The King *verſus* George Archbiſhop of Canterbury and Tho. Pryſt, Trin. 4 Car. rot. 441.

19. Het. 124. Jones 334. QUare Impedit. Ad preſentandum ad Eccleſiam Vicariæ de Ichingſtock, and makes title by the Statute of 21 Hen. 8. for that one Shilſton, being Vicar of Ichingſtock (which was a Benefice with Cure of Souls, above the value of 8 l. per annum) in the fifteenth year of King James took a ſecond Benefice (viz. the Vicaridge of Holcomb-Burnel, in the County of Devon) being a Benefice with Cure; and was thereto admitted, inſtituted, and inducted, whereby the firſt Benefice became void, and remained void for two years, and ſo title of preſentation accrued to King James, and from him deſcended to the King which now is, and therefore belongs to the King to preſent. The Archbiſhop claims nothing but as Ordinary. And the Defendant Pryſt pleads .... and confeſſeth the Kings title from the acceptance of the ſecond Benefice, whereby the firſt was void, and ſo remained void 21 Jac. and pleads the general Pardon of 21 Jac. and that the ſaid Shilton was not a perſon excepted in the Pardon, nor the ſaid cauſe of lapſe excepted: And that John Shilton, ſo being Incumbent, reſigned that Benefice of Ichingſtock, and gave title to John Fayle to preſent; who, upon the ſaid reſignation, preſented the Defendant, who was admitted, inſtituted, and inducted before the Writ of the King, &c. To this the Atturney General replies, Shewing the exception in the Pardon, wherein is excepted all Titles and Actions of Quare Impedit, others than ſuch Actions of Quare Impedit which the King hath or may have ratione lapſus incurred ultra three years laſt paſt, for, or concerning any Benefice whereof any Incumbent then was; or the laſt day of the Parliament, ſhould be in actual poſſeſſion, by the preſentation of any Patron, or the collation of any Ordinary: And that the ſaid Church being ſo void by lapſe, John Fayle preſented, &c. And traverſeth, That the ſaid Vicaridge of Ichingſtock vacavit per reſignationem of the ſaid John Shilſton. Upon this Replication the Defendant demurred; and after divers arguments at the Bar, and twice argued at the Bench in the Common Pleas, & the Judges being divided both times, viz. Richardſon chief Juſtice and Harvy for the Plaintiff, and Hutton and Yelverton for the Defendant; and afterwards Sir Robert Heath chief Juſtice of the Common Bench and Harvy for the Plaintiff, and Hutton and Vernon for the Defendant. By reaſon of this difference in opinions, it was adjourned into the Exchequer Chamber, and argued there at the Bar; and afterward by all the Juſtices of both Benches and Barons of the Exchequer, viz. by Sir Thomas Richardſon, chief Juſtice of the Kings Bench, Sir Robert Heath chief Juſtice of the Common Bench, Sir Humphry Davenport

Ante 61.

chief

chief Baron of the Exchequer, and by all the other Justices and Barons, and two main questions were made, First, If an avoidance of a Church happening and continuing void divers years, so as the King hath title to present by lapse, and the King doth not take advantage thereof, but dies, Whether the succeeding King may take advantage of this lapse, or be barred by the Statute of 25 Ed. 3. c. 1. And that rested only upon the exposition of the said Statute, the words whereof are (And touching Presentments to be made by the King or his Heirs, to any Benefice in anothers right, by old titles, the King granteth, That from henceforth he nor any of his heirs shall not take title to present to any Benefice in anothers right of any time of his Progenitors. Nor that any Prelate is bound to receive, &c. But that the King and his Heirs be for ever hereafter clearly barred of all such Presentments, saving always to him and his Heirs all such Presentments in anothers right fallen, or to fall, of all his time, and of the time to come.) It was strongly urged at the Bar, and also at the Bench by those who argued for the Defendant, That this Statute extends to all the Successors and Heirs of King Edward the third, that none of them may present to a Church in anothers right (as they argued that this Church is) Because the King hath not that title as to this proper Advowson, but in right of him who hath the Inheritance to any Church which falls in time of his Progenitors; and the rather for that in the Abridgment of the Statutes in the book of the Statutes, this saving is altogether omitted; So they conceived, The King was bound by the express words of the Statute, and that there is not any such saving. And of this opinion Vernon Justice continued. But Hutton who argued in the Common Bench for the Defendant in this point, That the title of the King was bound by the said Statute, And that he might not have title to present to a Church fallen in the time of his Predecessor by reason of his title of lapse fallen in the time of his Predecessor, now changed his opinion. And all the other Justices and Barons, besides Vernon, argued for the Plaintiff in this point, That the King hath good title to present by lapse incurred in the time of his Predecessor, and is not restrained by the Statute of 25 Ed. 3. For by the express words of the Statute, all rights and titles to present in his own time, until before the Statute, and in his time after; and all his Heirs, after the death of Ed. 3. are saved. And it shall not bar the Titles which the King had in anothers right, fallen or to fall in his own time, or in the time of his Heirs: And that there was such a Saving, appeared by the Copy out of the Parliament Roll, and by an ancient book in the Exchequer, writ in Parchment, Co. 8. 28. a. where it is writ with a Saving; And they held, That these words Of old Titles, is intended in the time of the Progenitors of King Edward the third, and not of any Titles of Presentments to fall in the time of Edward the third, or of any of his Heirs, but intended to exclude King Edward the third and all his Heirs from titles of Presentation in others right, fallen before the time of King Edward the

third, whereof any Church was full, and which title is only in anothers right: And that was the expreſs intent of the Statute, viz. to take away the Statute of 14 Ed. 3. cap. 2. in this point. And Berkeley and ſome of the Juſtices doubted, whether a Preſentation by lapſe ſhall be ſaid to be in anothers right, but only Preſentments by reaſon of Gardianſhip and Temporalties in the Kings hands: But all the other Juſtices and Barons agreed, that it ſhall be ſaid to be in anothers right; for although he preſents Ratione prerogativæ, yet he preſents as in the right of the Patron. So it is where one preſents by reaſon of a Church being void after forfeiture for alienation without licence, or for utlawry: And for that was cited 14 Ed. 3. Quare impedit 54. 22 H. 6. 29. 21 Eliz. Dyer 364. And for the principal point they relied upon 11 H. 4. 7. where it is ſo reſolved 7 H. 4. 25. 18 Eliz. Dyer 347. Cok. lib. 7. fol. 28. a. And many Preſidents, where the King makes title to preſent by lapſe, and title in anothers right. Wherefore for this point Richardſon chief Juſtice (who argued alone in one day) ſaid, It is to be taken for cléer Law, that the King hath good title to preſent; and the Declaration was good notwithſtanding that objection. The ſecond queſtion was, If Shilſton were Incumbent and might reſign, whether by his reſignation the Church is become void? And that reſted upon the expoſition of the Statute of 21 Jac. of the general Pardon, and the Statute of 21 Hen. 8. of Pluralities, whether the Church was abſolutely void by acceptance of a ſecond Benefice, being both with Cure; and if the Pardon unto him being in poſſeſſion, may make him Incumbent? And this point was argued ſtrongly in the Common Bench by Yelverton and Hutton, and afterwards there by Vernon and Hutton, and by both of them in the Exchequer Chamber for the Defendant, that this Church, by the Statute of 21 Hen. 8. was not abſolutely void in facto, but is voidable quoad the Patron, that he may preſent by the Statute; but until he preſents, the other remains incumbent; and then he remaining incumbent, and for three years being in poſſeſſion of the Church as Incumbent until the Pardon of 21 Jac. And the Pardon then coming, he being in poſſeſſion, eſtabliſheth him in poſſeſſion, and continues him Incumbent; and he cannot afterward be *cuſted* by the King or any other; and then he is Incumbent until he reſign: and therefore his plea is good; for he is out of the exception of the Pardon, for he was in for three years before the Pardon; and therefore they ſaid, He remained Incumbent, that he might plead as Incumbent by the Statute of 25 Ed. 3. as he pleads here; Alſo he is Incumbent as to all Strangers, but not as to his Patron; for he may preſent before any deprivation, although a Stranger cannot, becauſe the Church remains full againſt him: And he is Incumbent ſo as he may take a Releaſe of any Annuity iſſuing out of the Parſonage, and is chargeable in an Annuity, and is chargeable to the payments of Subſidies and Fifteenths; and may have an Action of Debt againſt any of his Pariſhioners for not ſetting out their Tythes:

Tythes: And many other reasons they alledged, and said, That the penning of this Statute differs much from the Statute of 31 Eliz. of Symony, and from the 13 Eliz. for not reading of the Articles; wherefore they concluded, that Judgment ought to be given for the Defendant. But all the other Justices and Barons argued against it; for they all held, That the Church was absolutely void in facto & jure by taking of the second Benefice, and that by the express words of the Statute of 21 H. 8. For at the Common Law, before the said Statute of 21 H. 8. by reason of the Canons and Constitutions Ecclesiastical, the first Church was in jure void, so as the Patron might present thereto if he would; but because it was but an Ecclesiastical Constitution, the Patron was not compellable to take notice of that avoidance, until deprivation and notice thereof given him; and then after deprivation the Church is void in facto & jure, and the Patron at his peril ought to present. And this appears by the Books 9 Ed. 3. 2. 5 Ed. 3. 9. 10 Ed. 3. 1. 24 Ed. 3. 30. 11 Hen. 4. 37. Fitzh. N. B. 34. L. 14 Hen. 7. 28. Now by the Statute of 21 Hen. 8. it is made absolutely void after Admission, Institution, and Induction, so it is void facto & jure, and the Patron at his peril ought to take notice thereof and present within the six moneths, otherwise a lapse incurs; And that it was void to all purposes absolutely, appears by the manner of pleading in this and all other such cases, That by the Admission, Institution, and Induction to the second Benefice, Prima Ecclesia vacavit de Parsona of the Incumbent, & vacans continuavit: So the Church is absolutely void by the pleading and confession of the Defendants: And this appears by the Books since the Statute of 21 Hen. 8. that by the acceptance of a second Benefice, the Church is void facto & jure quoad the Patron and all others 18 Eliz. Dyer 347. Coke lib. 4. fol. 75. b. Hollands Case, & 79. b. Digby's Case, & lib. 6. fol. 29. b. Greens Case, & 23 Eliz. Dyer 377. & Cok. Book of Entries 368. And for the reasons before alledged on the other side, viz. That he may plead as Incumbent, that is, because he is admitted by the Writ to be Incumbent, and his pleading as Incumbent is not contradicted; And for the taking of a release, it is much to be doubted; and if it be good, it is because he is in possession, as an Intruder, to whom a Release may be a discharge of such things: And for his being charged with Subsidies, that is, because he hath the profits, and therefore reasonable he should bear and pay the charges. And quoad his having debt for not setting forth Tythes, it was denied by all those who argued on the other side: And as to the Pardon of 21 Jac. all the other Justices and Barons held, That the Pardon doth not help him; First, Because it is no offence within the body of the Act; For it is not any offence or contempt against the King. Secondly, Because it never was the Intent of the Pardon to dispence with Pluralities, nor are there any words therein to make him an Incumbent, or to make a plenarty of a Church which was absolutely void. And divers of the Justices and the chief Ba-

Moor 441.

Co. 4. 75. b.

Aff. 356.

ron

Hob.167. ron held, That a ſpecial Pardon after ſuch an abſolute avoidance with words, That he may retain, or whatſoever other words he may have, cannot make him Incumbent. So the general words in the Pardon ſhall not inure to make a diſpenſation, and the Church being once void, ſhall not be full without a new Preſentation, Admiſſion, and Inſtitution. And for the words in the exception of the general Pardon, Of all Titles and Actions of *Quare Impedit*, others than ſuch Titles & Actions of *Quare Impedit* as have incurred by lapſe, above three years before the firſt day of this Parliament, whereof any Incumbent is in actual poſſeſſion by any Preſentation or Collation, &c. The laſt parts of this Exception do not extend to the ſaid Shilton; For that extends only to thoſe who are in as Incumbents (which he is not) And not to thoſe who are in as Incumbents by uſurpation and wrong, which are removeable by Quare impedit, and which may not be removed without Quare impedit. And it was ſaid, That ſince the Statute of 21 Hen. 8. there have been divers general Pardons, and no Pluralities were ever conceived to be within them; wherefore they concluded, That Judgment ſhould be given for the Plaintiff. And it was adjudged accordingly.

The Earl of Kent *verſus* Robert Steward and Scott
Hill. 8 Car. rot. 235.

12. 1 Ro.49.792. TReſpaſs. Upon a ſpecial Verdict the Caſe was. Francis Babington, ſeized en fée of the Manor of Kingſton in the County of Nottingham, and of the Manor of Aſheton in the County of Derby, of which Manor of Aſheton, the place where is parcel, by Fine, 41 Eliz. conveyed the ſaid two Manors to Guilbert Earl of Shrewsbury and his wife, to the uſes following (viz.) of the Manor of Kingſton, to the uſe of them, their Heirs and Aſſigns. And of the Manor of Aſheton, to the uſe of the wife of Babington for her life; and after to the uſe of the Heirs of Francis Babington, until Julian wife of Francis Babington ſhall evict and expell the ſaid Earl or Counteſs, their Heirs or Aſſigns, their Farmors, Tenants, or Leſſees, of or from the Manor of Kingſton, or any parcel thereof; and after ſuch eviction, then to the uſe of the ſaid Earl and his wife, their Heirs and Aſſigns, until they ſhould be ſatisfied with the profits for their loſs. Francis Babington, for money by Fine, in Hill. 43 Eliz. conveys the Manor of Aſheton to Sir Thomas Reisbie and his Heirs, to the uſe of him his Heirs and Aſſigns. The Earl of Shrewsbury and his wife by Fine, Trin. 43 Eliz. conveys the Manor of Kingſton to the uſe of the Earl of Kent and his wife, and the Heirs of the Earl of Kent. Upon the firſt of April 17 Jac. Sir Tho. Reisbie deviſeth the Manor of Aſheton to Sir Francis Wortley and to others for two thouſand years. Upon the firſt of May 17 Jac. Sir Thomas Reisbie died ſeized of the ſaid Manor of Aſheton.

Upon

Upon the first of September 17 Jac. Francis Babington died; After his death, 20 Jacobi, Julian the Wife of Francis Babington evicted from the Earl of Kent in Dower, parcel of the Manor of Kingston, of the value of 200 l. per annum, and enters. The Earl of Kent enters into the Manor of Asheton upon the Defendants, being Assignées of the said Lease, who re-entred; and he brings this Action: And whether his Entry be lawful, was the question? And after argument divers times, it was adjudged for the Defendants, That the Entry of the Earl was not lawful. And the main question was, The limitation of Asheton, being to the use of the wife of Babington for life, and after to the use of the right Heirs of Babington, until the said wife of Francis Babington should evict the Earl of Shrewsbury and his wife, their Heirs or Assigns, their Farmors or Tenants of or from the Manor of Kingston, or any part thereof; Whether the Earl of Kent as Assignée may take the benefit thereof? And in this point all the Justices unanimously resolved, That he as Assignee might not enter, but that the use upon the Eviction ought first to vest in the Earl of Shrewsbury and his Heirs, and that this Conveyance before the Eviction, cannot give unto him title of Entry as Assignée; for the words Heirs and Assigns are to be taken as words of limitation, viz. That the Earl of Shrewsbury by his Entry shall have it, by limitation to him, his Heirs and Assigns; and it shall not first vest in the Assignée as Purchasor; and it is not such interest which is assignable over before eviction; and the power of Entry is not transferred with the Estate of Kingston: But whether the Conveyance of the Manor of Kingston, and the Conveyance of the Manor of Asheton by Francis Babington, before any eviction, hath destroyed the privity of Entry after eviction (the Estate being transferred to another before the eviction) they did not deliver any opinion, nor agreed. But for the first cause they all agréed, That the Earl of Kent hath no title of Entry as Assignée; And therefore for that cause it ought to be adjudged against him. Vid. Co. lib. 1. fol. 135, 136. Chudleys Case Plowd. 483. Nicholsons Case, Co. 8. fol. 75. Lord Staffords Case, Co. Lib. 10. fol. 51. Lampets Case, Co. lib. 4. fol. 66. lib. 5. fol. 95. Plowd. 345. Bretts Case.

1 Cr. 511.

Pl. Com. 345 a.

Pl. Com. 483 b.

Termino

Termino Paſchæ, anno decimo *Caroli* Regis, in Banco Regis.

The King *verſus* Bagſhaw. Cujus principium ante pag. 347.

THE Iſſue being joyned, Whether there were ſuch a Cuſtome as is pleaded? Littleton, now Recorder of London, certified, ore tenus, that there was not any ſuch Cuſtome generally; For he ſaid, that the Cuſtome is not, that one brought up as an Apprentice in the Trade of a Goldſmith, Cutler, &c. being a Freeman of London, by colour thereof may uſe any other manuall Trade: But one of a Trade, who uſeth buying and ſelling, may exerciſe another Trade of buying and ſelling. But this he did not mention in his Certificate, but generally, ore tenus, certified, that there is no ſuch Cuſtome as is pleaded. 1. 2 Rol. 579. Poſt. 516. Poſt. 517. R. 284.

Mackaller *verſus* Todderick. Cujus principium ante pag. 337. 353.

AND now the Court was of opinion, that the conſideration was illegall, and that the Action lies not; For the conſideration to have money, to procure him to be Rector of the Church, is a Symoniacall Contract and an unlawfull Act, condemned by all Laws. Vide 2 Hen. 4. 9. Coke lib. 10. fol. 99. Bewſages Caſe, & 19 Eliz. Dy. 355. Oneleys Caſe, 2 Hen. 5. 10. And where it was alledged, that Symony is ſuch a ſpiritual thing, and ſuch an offence whereof the Common Law takes not any notice, at leaſtwiſe did not, before the Statute 31 Eliz. that was denyed. Secondly, It was held, that this Declaration is not good; for the promiſe is to pay him, after that he is Rector; and he ſhews, that he was Rector by his procurement upon this promiſe, which cannot be; For he never was Recto, but a Perſon utterly diſabled to be a Parſon by this Symoniacal Contract, as in 23 Eliz. for not reading of Articles, and the Caſe in Cok. Lit. Vernons Caſe, for the buying of Offices; whereupon it was held to be Error, and the Judgment was reverſed. 2. Jones 341. 1 Rol. 18. R. 33. Poſt. 426. Ant. 229. Co. Litt. 234. a

Ward *verſus* Petiſer.

3. 1 Rol. 829. Poſt. 546. EJectione firmæ. Upon a Leaſe for five years by the Vicars Choralls in Litchfeild, of parcell of a Meadow, called the Parſons Hayn, in Cheſterton. Upon Not guilty pleaded and evidence to the Jury at the Bar, the Defendant pretended, that the Leſſors had not the intereſt of the Soil, but that the Freehold was in Sir Edward Peto; and that the ſaid Leſſors had only primam Tonſuram of the ſaid Land, from the Hayning, untill the Crop mowed and carried away; for they never had other profit thereof, but that Sir Edward Peto had all the profit thereof for the reſidue of the year; and then an Ejectione firmæ being brought of the Land it ſelf, will not lie; And therefore they endeavoured to prove, that Sir Edward Peto, being Lord of the ſaid Manor, uſed every year after the Crop taken away, to feed the Meadow with Cattle, and to take the trees and buſhes growing thereupon. But on the Plaintiffs part it was confeſſed. That they had only the firſt Crop. But that they uſed to hayn it ſooner or later at their pleaſure, and to keep it longer or ſhorter time uncut according to the ſeaſonableneſs of the year, which proves, That the Freehold was in them who had the firſt Crop. And of this opinion was all the Court, that properly, unleſs other matter be ſhewn to prove the contrary, the Freehold is in him who R. 223. hath the firſt Tonſure; for that is the moſt beneficiall part of the year: And thoſe who have the after Paſture, have but the profits in nature of Common: But admitting he hath but the firſt Crop, yet they held, that he may well have an Ejectione firmæ thereof. Yet the Court adviſed the Jury, That if they conceived the Vicars had R. 67. only the firſt Crop, and not the entire profits through all the year, Poſt. 546. as the evidence whereby the Defendants claim (which was a Leaſe in 29 Hen. 8. whereby he let the Rectory and Tythes, except the Parſons Hayn (which was the Land in queſtion) for 42. years; and after a conveyance of the Parſons Hayn, 5 Ed. 6.) imports; then they ſhould find this matter ſpecially, and leave it to the Law, whe- Poſt. 492. ther an Ejectione firmæ lies in this manner: But if they conceived the intire Land for all the year to be appertaining to the Vicars, then they might give a general Verdict. And afterwards the Jury found a general Verdict for the Plaintiff.

Goldſmith *verſus* Ellen Sydnor, Adminiſtratrix of William Sydnor. Mich. 9 Car. rot.

4. 1 Ro. 925. 6. Stiles 143. DEbt upon an Obligation. The Defendant pleaded, that the ſaid William Sydnor, the Inteſtate, 16. Maii 9 Carol. coram Roberto Heath, chief Juſtice of the Common Bench, conceſſit ſe teneri to Edward Hobert, in 400 l. to be paid at Pentecoſt next enſuing: Et ſi deficerit, &c. voluit & conceſſit per ibidem ſcriptum, quod incurreret ſuper ſe, Heredes & Executores pœna in Statuto Stapul. &c. And further pleaded a Judgment againſt him in debt for two hundred pounds, at the Suit of Richard Hobert in the common

Common Bench; And that the ſaid William Sydnor in his life did not pay the ſaid debt of 400 l. nor any part thereof; and that the ſaid Statute remains in his force; and that he hath not goods to be adminiſtred beſides, to the value of 100 l. which are lyable to the execution, upon the ſaid Statute and Judgment, Et hoc parat. eſt, &c. The Plaintiff replies quod bene & verum eſt, that the ſaid William Sydnor, by the ſaid Recogniſance conceſſit ſe teneri, to the ſaid Edward Hobert, &c. but that there was a Defeaſance betwixt them, that if he had paid 100 l. to one Edward Leythorp upon the firſt of June 1635. and ſhould ſave him harmleſs, &c. And that the ſaid Statute ſhould not be forfeited, And that the Defendant hath ſufficient to ſatisfie the Plaintiff and the ſaid Judgment. And hereupon the Defendant demurred. And it was now argued by Grimſton, that this Statute, not being yet forfeited, is not pleadable, and relyed upon the Caſe of Harriſon, Co. lib. 5. fol. 28. b. But in this point the Court held, that there is a difference betwixt this Caſe and Harriſons, which was a Statute with a Defeaſance for the performance of Covenants, which peradventure never ſhould be broken, and therefore it ſhall be no plea to barre: But here is a Statute for the payment of money abſolutely, at a day certain, which is allowable before debts upon an Obligation: But then Rolls for the Plaintiff took an exception to the Plea in Barr, that the pleading of the Statute was not good, becauſe it is not ſaid per ſcriptum ſuum Obligatorium, nec ſecundum formam Statuti, &c. And of this opinion was all the Court. Vid. Cok. lib. 4 fol. 64. b. Fullwoods Caſe; Wherefore for this cauſe Rule was given; That Judgment ſhould be entred for the Plaintiff, unleſs good cauſe were ſhewn, &c. And afterward, upon a ſecond motion, Judgment was given for the Plaintiff, for this inſufficiency, and exception to the Plea in Barr, by Richardſon, Jones, and Berkeley: But I conceived, that the Plea being but a Plea in Barr, and it being mentioned, that he acknowledged, If he failed of the payment, the penalty in the Statute Staple ſhould incurre upon him; It cannot be intended, but to be a Statute acknowledged according to the form of the Statute of 23 Hen. 8. and the rather, becauſe it is ſaid quod poſt recognitionem prædictam, ſuch a defeaſance was made: So he admits it to be a Recogniſance: But notwithſtanding it was adjudged for the Plaintiff.

2 Cr. 9.
2 Cr. 35.
3 Cr. 315.
1 Rol. 925.
Ante 209.

Boreton *verſus* Nicholls & alios, Paſch. 7 Car. rot. 115.

ERror of a Judgment in the Common Bench in an Ejectione firmæ: The Caſe was. James Beck, Clerk, was ſeized in fee of Lands in Moreton-Henmarſh, being the Lands in queſtion, and had Iſſue Job his eldeſt Son and James his ſecond Son, and by Indenture quinto Martii octavo Jacobi infeoffs of thoſe Tenements Sir Nicholas Overbury and others, to the uſes in the Indenture,

5. Poſt. 401.

viz. to the uſe of the ſaid James Beck Clerk, the Father, for his life, without impeachment of waſte; and after, to the uſe of James Beck the ſecond Son, for his life; remainder after his deceaſe to the uſe of the firſt Son, of the ſaid James Beck the Son, which ſhould have Iſſue Male of his body, and to his Heirs for ever. And for want of ſuch Iſſue the remainder to the uſe of the firſt Daughter of the ſaid James Beck the Son, which ſhould have Iſſue of her body, and to her Heirs for ever. And for default of ſuch Iſſue, the remainder thereof to the right Heirs of the ſaid James Beck the Son for ever. They find, that James Beck Clerk, the Father, was ſeized for life; the remainder to James Beck his ſecond Son for life; the remainder over, &c. prout. That the ſaid James Beck Clerk, the Father, died ſeized, the ſaid Job Beck being his Son and Heir: And that the ſaid Job had Iſſue Henry Beck the Leſſor, and died. That the ſaid James Beck, Son of the ſaid James Beck Clerk, entred after the death of his Father, and had Iſſue James Beck; and that the ſaid James Beck the Grandſonne died without having Iſſue; And that the ſaid James Beck, the Son, after the death of the ſaid James Beck his Son, ſo ſeized, levied a Fine of thoſe tenements *ſur cogniſance de droit come ceo*, &c. with Proclamation 21 Jac. to Richard Brett and William Wheeler, who entred by force of the ſaid Fine, and the ſaid Henry Beck, the Son of Job Beck, entred upon them, and demiſed to the Plaintiff for years, upon whom the Defendant, by the command of the ſaid Richard Brett and William Wheeler, entred and *ouſted* the ſaid Leſſee; and that the ſaid James Beck, Son of the ſaid James Beck Clerk, is yet alive. Et ſi ſuper totam materiam, &c. and upon this Verdict, after divers arguments in the Common Bench, it was adjudged for the Defendants, that this remainder to the younger Son, who ſhould have Iſſue, is but a contingent Remainder, and a remainder to the right heirs, veſted in James the Son; And that his fine is no cauſe of forfeiture: Nor that the ſaid Henry, as heir of Job, might take advantage of the forfeiture. And this Judgment being moved by a writ of Error into the Kings Bench, it being once argued at the Bar, without much difficulty, the Judgment was this Term affirmed.

Co. 1. 66. b. Ant. 24. Co. Lit. 319. b.

Termino

Termino Trinitatis, anno decimo *Caroli* Regis, in Banco Regis.

Burgesses Case.

ONe Burgesse being outlawed upon an Endictment of Manslaughter in the County of Middlesex, brought a Writ of Error to reverse the outlawry, and assigned for Error, that he was over the Seas at the time of the Outlawry, viz. at Utrick, in partibus transmarinis: Hereupon counsell being appointed for the Prisoner to plead, and the Error assigned, the Kings Attorney takes Issue, that he was here in Middlesex at the time of the Outlawry, and traverseth his being at Utrick, prout: whereupon Issue being joyned, and a Jury of Middlesex at the Barr the first day of this Term, Calthorp, being assigned of Counsell for the Prisoner for assignment of Error, offered in evidence a Certificate under the Seal of the said Town. Jones Justice moved it as doubtfull, whether he might have Counsell upon his Triall, but all the other Justices held cleerly, that he shall have it, when the Triall is not upon the fact in the Endictment, but upon collaterall matter (viz, of his being beyond Seas.) And all the Justices held, that it is not materiall in what place beyond Seas he was, so as he was over the Seas; and that the Certificate under the Seal of the town where he was resident without oath of the truth thereof, and one sworn for the exposition of it into English, is not allowable; but a witness being sworn, said certainly, that he was there in service at the time of the Outlawry and before; whereupon the Jury gave their Verdicts accordingly; and then he was instantly arraigned upon the Endictment, and pleaded, &c.

1. 2 Ro. 571. Co. Litt. 74. a. Lib. 9. 31. b. Ante 134. 147.

The Case of Langforth Bridge.

INformation against the Inhabitants of the County of Middlesex, for not repairing of Langforth Bridge, which by the Information was supposed to be an ancient Bridge, and time out of mind had been used to be repaired by the Inhabitants of that County. The Defendants, protestando that it is not an ancient Bridge; for plea say, that it lately was erected by the King for the benefit of his Mills; and hereupon Noy the Kings Attorney demurred, because he doth not answer, that it was an antient Bridge, but by protestation, which being the substance of the Information, ought

2.

ought to be especially answered or traversed. Secondly, that the County ought to maintain Bridges, because they be for the ease and benefit of the people, unless it be shewn who ought to repair them: And to that purpose he cited 10 Ed. 3. 28. and an antient Record for Bow-Bridge 8 Ed. 2. in this Court, that the Jury found, it was to be repaired by the Abby of Dertfort, and 37, Assis. and a Record in 5 H. 5. in the Exchequer; whereupon all the Court held the Plea to be ill, and Rule was given, that Judgment should be entred for the King, unless, &c.

Sir Edward Duncombs Case.

3. R. 465. 1 Rol. 390. 2 Sand. 160.

SIR Edw. Duncomb being endicted, for that there being an antient High way in Batlesdon, he had inclosed his lands on both sides thereof, whereby he had straitned it, and the way was become Lutosa & lounderosa, whereas by the Law of the Land he ought to have made it a sufficient way. Upon Not guilty pleaded, and evidence to the Jury at the Barr, it appeared to be a way betwixt two Lands ends in the common field, and that it was but four yards wide. But it was proved, that although he had made a Causey reasonable good at his own charge for Horse-men, yet Carts and Coaches might not pass, nor could meet for the straitness thereof, nor might go besides the way. And although it was also proved, that by this charge he had made it better than it was before, yet because he had made the Hedges and the Inclosure in that manner, he at his perill ought to maintain the way: And whereas before the Parish was chargeable with the reparations, now by this inclosure he is bound to repair it and to make it a good way, and maintain it at his own charge and perill only. And Noy Atturney general said, It was so resolved in 6 Jac. and 19 Jac. upon conference with all the Justices of England, which Richardson chief Justice affirmed.

William Seagood *versus* Hone and Alice his Wife.
Mich. 8 Car. rot. 195.

4. 1 Rol. 829. 2 Rol. 61. Jones 342.

EJectione firmæ, for Lands in Tuddington of a Lease of Henry Seagood for three years. Upon Not guilty pleaded and special Verdict, the Case was, John Reve, Copyholder in Fee of the Manor of Tuddington (where the Custome was found to be, that any Copyholder might surrender out of Court into the hands of two Tenants, Copyholders of the Manor, to the use of any other) surrendred into the hands of two such Tenants of the Manor, the said Tenements to the use of Francis Reve, and John Reve son of the said Francis, and of the longest liver of them both. And for want of Issue of the said John Reve the Son, of his body lawfully begotten, the Lands to remain to the younger Son of Mary Seagood, wife of William Seagood: This surrender not to stand and be

be in full force until after the death of John Reve. John Reve died, ...and the surrender was presented at the next Court; And Francis Reve, and John Reve son of the said Francis were admitted tenants to them and the longer liver of them, and to the heirs of the body of the said John Reve the son, the remainder to the younger son of the said Mary Seagood. They also found, that Francis, and after John Reve, died without issue; and that Henry Seagood was the younger son of the said Mary, at the time of the surrender, who was admitted Tenant and entred and made a Lease for three years to the Plaintiff: And that the said Alice, wife to the Defendant, is heir to the said John Reve, and entred and *ousted* the Plaintiff. And if, &c. The first question was upon this clause, (This surrender not to stand and be in full force, until after the death of *John Reve*,) whether the surrender be good, and that clause void? And it was resolved, that the surrender was good; and that clause (being repugnant to the premisses) shall be rejected as void and idle, and shall not destroy the premisses. The second question, whether upon this surrender John had an Estate for life only, or an Estate to him and his heirs of his body? And it was resolved, that John had but an Estate for life; and being an Estate for life limited by express limitation, it shall not be an Estate unto him higher by implication. And although peradventure, it might be further inlarged by implication in a devise, yet it shall not be so in a surrender or conveyance; in passing of which, the party ought or might have had sufficient counsell to direct him: Wherefore for the two first points, it was resolved for the Plaintiff by the opinion of all the four Justices. But for the manner of the finding, Jones doubted whether it should be a sufficient surrender to the use of the Plaintiff, Because the Verdict finds, that it is customary Land of the Manor of Tuddington, and the surrender ought to have been into the hands of two Tenants of the Manor. But the Copy of the surrender found, is in hæc verba, Tuddington in the margent, At the Court Baron of the Honour of *Hampton*, *J. S.* and *J. D.* Tenants of the Honour of *Hampton*, do present, that *John Reve* did surrender into the hands of the two Tenants of the Honour, &c. ut supra. And that being a Court of the Honour, and into the hands of the Tenants of the Honour, is not good. But all the other three Justices held, It was good enough; For Tuddington being in the margent, It shall be said a distinct Court by it self: For an Honour consists of many Manors, yet all the Courts for the Manors are distinguished and have several Copyholders; And although there is for all the Manors but one Court, yet they are quasi several and distinct Courts. And so it was usually in the time of the Abbeys, that they kept but one Court for many Manors: Whereupon it was adjudged for the Plaintiff.

2 *Co.* 376.

Jones 326.

2 Cr. 416. Co. 9. 128. a.

Co. Litt. 58. a. Co. 4. 27. a.

Spirt

Spirt *verſus* Bence. Hill. 8 Car. rot. 246.

5. Stiles 308. ERror of a Judgment in the Common Bench, in an Ejectione firmæ; where, upon a ſpecial Verdict, the Caſe was: Thomas Cann, being ſeized in Fee of divers Meſſuages and lands holden in Socage, and having three Sons, Thomas, Francis, and Henry, deviſeth his Lands in this manner. I Deviſe to *Thomas* my Lands in *Horton*, to him and his Heirs Males of his body; Remainder to *Francis* and his Heirs. *Item*, I give to *Francis* my Son my houſe in *Wickwarr*, to him and to the heirs Males of his body. And for lack of ſuch Iſſue, To my Son *Henry* and the heirs Males of his body. *Item*, I give to my Son *Henry*, and his heirs, freely my houſe in the Burrough of *Wickwarr*, in which I dwell. *Item*, I give unto my ſaid Son *Henry* my houſe and lands in *Impſteade*. *Item*, I give unto him two houſes in *Wickwarr*, in the tenure of *J. S. Item* I give unto the ſaid *Henry* my paſtures called the *South-fields*, & one Meadow called *Warhay* in *Wickwarr* (which are found to be the Land in queſtion) yielding the rents and ſervices therefore due. Alſo I will, that all Bargains, Grants, and Covenants which I have from *Nicholas Webb*, my Son *Henry* ſhall enjoy, and hir heirs for ever: And for lack of heirs of his body, To remain to my Son *Francis* for ever. *Item*, I will, That my wife *Margaret* ſhall have the uſe and keeping of my Son *Henry*, and of all the premiſſes to him bequeathed, during her natural life, paying to him yearly for his maintenance eight pounds, trayning him up in learning, and what more of her own pleaſure. They find, that Thom. Cann the Deviſor died 1576. That the Lands called South-fields and Warhay, are the Lands in the Declaration; And that they be not parcel of the Grants, and Bargains, which Thomas Cann had of Nicholas Webb. That Tho. Cann the Son, had iſſue Tho. Cann the Leſſor; that Henry entred into the Lands in the Declaration, and took the profits thereof, and was ſeized prout Lex, &c. And that afterwards the ſaid Henry took to wife Elizabeth; And that in 38 Eliz. in the life of Margaret he infeoffed of the Lands in queſtion Rich. Lothington and George White, and their Heirs, to the uſe of the ſaid Henry and Elizabeth his Wife, and the heirs of their bodies, and after to the uſe of the heirs of Henry, with warranty to the Feoffees and their heirs againſt all perſons. Afterward, that Margaret dyed; And then Henry dyed without iſſue; and the ſaid Elizabeth ſurviving, held her ſelf in, &c. That Thomas Cann the Leſſor was Couſin and heir of the ſaid Henry, viz. Son of Thomas Cann, Son and heir of the ſaid Thomas Cann, the heir of the Deviſor, and was of full age of one and twenty years at the time of the death of Henry. And that afterward the ſaid Thomas Cann entred, and made the Leaſe, in the Declaration mentioned: And that the ſaid Elizabeth took to husband the ſaid Robert Spirt, who thereupon reentred; And that the ſaid Elizabeth is yet alive. Et ſi ſuper totam, &c. And after

ter divers continuances, Judgment in the Common Bench was given for the Plaintiff. And of this Judgment a Writ of Error was brought, and the Error assigned in point of Law; and it was argued divers times at the Bar, viz. by Maynard, Mason, and Noy Atturney General for the Plaintiff in the Writ of Error, and by Germyn, Mallet and Calthorp for the Defendant. And in this Term it was openly argued at the Bench two several days, viz. by Berkeley and my self the one day, and by Jones and Richardson on another day. Two questions were made and argued, First, Whether Henry hath an estate for life only, by this Devise, in the Lands in question, or an estate Tail? For if he hath an estate Tail, then it is a discontinuance, and Judgment clearly ought to be given for the Defendant. And it was strongly urged, That the last clause in the Devise to Henry, where it is devised To him and his heirs; And for lack of heirs of his body, To remain to *Francis* and the heir of his body, extends to all the clauses before, and makes him to have an estate tail in all the Lands devised unto him. And one special reason offered, was, because he devised to Thomas and Francis, his eldest and second sons, Estates of inheritance: So he intended to give as great an Estate to his youngest Son; For by intendment, his affection is equal. Also the word Item couples them together, that he should have as great Estate in quality as the others. And against this point all the four Justices argued and agreed, That Henry had but an Estate for life in the Land in question; And that the last clause, (And for lack of heirs of his Body) shall extend only to the Lands in that clause, viz. to the Bargains and Grants. And it is found, That it was not any part of the Bargains and Grants. They all agreed, That the words in a Will which disinherit the Heir at the Common Law ought to have an apparent intent, and not to be ambiguous and doubtful; and that the intent ought to be collected out of the words of the Will, and not from any forrain intendment or averment: And therefore when he gave to Thomas in tail, and in the second, to Francis in tail, and in the third, to Henry in fee, and in the fourth, to Henry only: not mentioning any Estate, the Law shall construe it, that he shall have it but for life; and that he did not intend a greater estate. And for the word Also, it is no more than the word And, and shall not extend to the quantity of the estate, but to the clause following, That he deviseth, &c. And for that was relied upon the Books Co. 6. 16. Wilds Case, and Coliers Case there: Vid. 22 Ed. 3. 16. 7 Ed. 6. Devise 38. 28 Hen. 8. Dy. 1. 34 Ed. 3. Avowry 158. Co. 9. 127. Sundays Case; wherefore for this point they all agreed, That it was but an estate for life, and concluded with the Judgment in the Common Bench. Secondly, Whether this warranty be a Bar during the life of the *Feme*? It was objected that it was a warranty, which commenced per *disseisin*, so as it cannot bar: For when Henry entred in the life of Margaret, it was a disseisin to her, and by consequence to him in Reversion. But in this point all the

Co. 6. 17. a.

Post. 450.

Juſtices agreed, that it was no warranty which began by diſſeiſin; for firſt it is doubtful, whether the *Feme* had an eſtate for life, or only the Gardianſhip? And Berkeley held, That ſhe was only Gardian; but the others againſt him, Becauſe the limitation is; She ſhall have it during her life. But although ſhe hath title by that
Co 3.59.a. deviſe to have an Eſtate for life, yet it is not found that ſhe ever was ſeized thereof; and therefore it cannot be a diſſeiſin unto her. Alſo it is no warranty beginning by diſſeiſin, Becauſe Henry occupied from the death of Thomas Cann his Grandfather, and entred 1576. and it is not found, That he made any diſſeiſin, nor had any ſuch inten-
Ante 304. tion at the time of the entry by himſelf. Thirdly, Then the queſtion is, If it be a good warranty and deſcends, whether it ſhall bind during the life of the *Feme*? And as to that point Richardſon and Berkeley held, That it was a good warranty and ſhould bind: But Jones and my ſelf argued againſt it, Firſt, Becauſe the warranty
Hob. 27. never attached in the Feoffees and *Ceſty que uſe* cometh in in the poſt, and before the warranty atatched; and therefore Jones denied the reſolution mentioned in Lincoln Colledge Caſe. Cok. 3. f. 62. et 63. and ſaid there was not any ſuch reſolution; And relied upon the Caſes 22 Aſſ. 37. & 29 Aſſ. 34. That he that comes to Land in the poſt (as Lord of a Villain or Lord by Eſcheat, who enter before the warranty attached by deſcent) ſhall never have advantage of the warranty, which was not attached at the time of his entry; and upon that reaſon is Cok. lib. 1. fol. 125. a. Chudleys Caſe, He who hath an Eſtate executed by uſe, by the Statute of 27 Hen. 8. ſhall not have advantage of a warranty by *Voucher*, nor otherwiſe. The ſecond reaſon, Becauſe that the warranty eodem inſtante it was created, is deſtroyed; for inſtantly the Land returned to the Feoffor, and is extinct quoad the Reverſion clearly, becauſe the Reverſion is revested in him in a Fee as high as he gave it. And it is alſo determined quoad the *Baron* himſelf for the preſent Eſtate; for the warranty hath no eſſence, or being in him to have benefit by *Voucher* or *Rebutter*: Therefore it ſhall have no eſſence quoad the *Feme*. And although it ſhould be held, that, Coke lib. 3. fol. 62. a. Lincoln Colledge
Jones 200. Caſe ſhould be Law, yet this differs from that Caſe; for there he who recovered againſt Tenant in Tail, obtained a Leaſe with warranty from an Anceſtor collateral; and made a Feoffment to uſes, and there the warranty was created, and did extend to the eſtate before the Feoffment. But here the warranty begins with the Feoffment to uſes; And the Feoffee himſelf may never have benefit thereof by *Voucher* or *Rebutter*, and inſtantly with the creation is deſtroyed: And therefore compared it to the Caſe 40 Ed. 3. 14. 11 H. 4. 41. 20 H 6. 29. where one makes a Feoffment with warranty, and afterward takes again by Feoffment, The warranty is determined, becauſe he hath as great an eſtate as he gave. But Richardſon and Berkeley argued, Although the warranty is determined for the Inheritance, and ſhall not bind the husband for the preſent eſtate; yet it is good, and ſhall be continued for the *Feme*; and therefore quoad

her

her eſtate, ſhall be ſaid to have continuance; and in proof thereof theſe Caſes were urged, 17 Ed. 3. 47. 39 Ed. 3. 9. 31 Ed. 3. Voucher 25. where the *Baron* made a Feoffment with warranty againſt all perſons, and takes back an eſtate to him and his wife, and to a ſtranger, and to the right heirs of the *Baron*, The Warranty is determined quoad the Fœſimple, but it is in eſſe, quoad the Eſtate of the wife, and quoad the ſtranger. But to theſe Caſes it was anſwered, That they be not like to the Caſe in queſtion, becauſe there the warranty was well created and veſted in the Feoffee, and is annexed to his eſtate, and he was entitled to the benefit of it by *Voucher* or *Rebutter*; and when he took back the Eſtate, it veſted in him as Aſſignee in the per, and not in the poſt, which is the reaſon of the Caſe 31 Ed. 3. where a fine was levied with warranty to the Conuſee, his heirs and aſſigns, who renders by the ſame fine to the Conuſor and his wife, That ſhe ſhall have benefit by this warranty by *Voucher*, although it returns eodem inſtanti; for the Eſtate is given by the render, and ſhe is in the per, but ſo it is not here. And although it was alledged, That every one coming in of any Eſtate may rebut by the warranty attached upon the Land, yet as this caſe is, becauſe he comes in the poſt, before the warranty attached, he ſhall not have benefit thereof; And therefore Jones cited a Caſe 7 Eliz. in the Common Bench, where one made a Feoffment with warranty, to the uſe of himſelf for life, remainder for life, remainder to his right heirs, That it was reſolved this warranty ſhould not bind, for the remainder to have benefit thereof. The third reaſon was made by Jones and my ſelf, That a Feoffment with warranty being by Tenant for life, to bar the Reverſion, is not favoured in Law. And when it is to the uſe of himſelf and his wife, and to the uſe of his right heirs, the warranty is deſtroyed quoad him who created it, and never by any means may bind him in his life. And when the Anceſtor is not bound thereby, his heirs may not be bound, as Litt. ſect. 734. Uncle of Tenant in Tail being infeoffed, makes a deviſe with warranty, which deſcends upon the Iſſue in tail, it ſhall not bind, becauſe it is a Maxime, That the Heir is not bound where the Anceſtor is not bound himſelf; and to that purpoſe was cited 31 Ed. 3. grants 85. A Father binds his heirs where he doth not bind himſelf, It is void to bind the heir, Co. Litt. 386. a. wherefore for this point, the Court being divided, Adjournatur.

Co. Lit. 390. a.

Co. 3. 63. a.

Poſt. 392.

Sir Henry Ferrers Caſe.

SIR Henry Ferrers, Baronet, was endicted by the name of Sir Henry Ferrers Knight, for the murther of one Stone, whom one Nightingale feloniouſly murthered, and that the ſaid Sir Henry was preſent, aiding and abetting, &c. Upon this Endictment Sir Henry Ferrers being arraigned, ſaid, That he was never Knigh-

6. Jones 346. Ante 104. 2 Cr. 482.

ted, which being confessed, the Endictment was held not to be sufficient; wherefore he was endicted de novo, by the name of Sir Henry Ferrers, Baronet; and being arraigned pleaded Not guilty, and was tried at the Bar; and upon the Evidence it appeared, That he was arrested for debt, and that Nightingale his servant in seeking to rescue him, as was pretended, killed the said Stone: But because the Warrant to arrest him was by the name of Henry Ferrers Knight, and he never was a Knight, it was held by all the Court, That it was a variance in an essential part of the name, and they had no authority by that Warrant to arrest Sir Henry Ferrers Baronet: So it is an ill Warrant, and the killing of an Officer in executing that Warrant cannot be murder, because no good Warrant. But upon the Evidence it appeared clearly, That Sir Henry Ferrers upon the arrest obeyed, and was put into an House before the fighting, betwixt the Officer and his Servant; wherefore he was found Not guilty of the Murder and Manslaughter.

Co 9.68.a. 2 Cr.280.

Dorchester *versus* Webb. Mich. 9 Car. rot. 373.

7. Jones 345. 1 Rol. 934. Hutt. 128.

DEbt, by Anne Dorchester, Executrix of Anne Rowe, upon an Obligation of 260 l. by William Webb. The Defendant pleaded, That John Dorchester, late Husband to the said Anne, and the said William Webb were obliged in this Bond jointly and severally to the said Anne Rowe; and that the said John Dorchester died, and made the said Anne his wife the now Plaintiff, and the said Anne Rowe the Obligée his Executrices; and that the said Anne Rowe renounced, and the said Anne Dorchester administred, and that *Assets* to pay the said Debt came to the Plaintiff, Et hoc &c. The Plaintiff confesseth the Will of John Dorchester: And that the said Anne Rowe renounced, And that the said Anne Dorchester fully administred all the Goods of John Dorchester; And after the said Anne Rowe made the Plaintiff her Executrix, And that neither at the death of the said Anne Rowe, nec unquam postea, any goods of the said John Dorchester came to the hands of the Plaintiff. And upon this the Defendant demurred; and it was argued by Sir John Banks and Grimston for the Defendant, and by Calthorp and Serjeant Ward for the Plaintiff: And the Defendant much insisted, That when the Obligée makes the Obligor his Executor, it is a release in Law of the Debt, and so it is when he makes one of the Obligors his Executor; For a release to one is a release to both. And by the same reason when the Obligée makes the Executor of one of the Obligors, who is chargeable to that Debt, his Executor, It is a release in Law of that Debt; for he may not sue himself, nor his Companion: And although it be pleaded, That he fully administred the goods of John Dorchester, yet that is not material, nor alters the Case; for she remains always the Executrix of John Dorchester, and may have the goods of the said

Co.Litt.364.b. 3 Cr.161.

said John Dorchester: And for that purpose cited Mary Shipleys Case, Co. 8. fol. 134. That if an Executrix pleads plene administravit, the Plaintiff may take Judgment presently, and expect when she hath *Assets*: But Jones, Berkeley, and my self (Richardson being absent) agreed, That the Defendant hath no cause of demurrer, but that Judgment shall be given for the Plaintiff. First we agreed, That when the Debtee makes the Debtor his Executor, it is not absolutely a discharge of the Debt; for the Debt remains as *Assets* in the hands of the Debtor Executor, and is quasi a release in Law, because he cannot be sued, but it is a mere suspension of the Action, where the *Feme* Debtee takes the Debtor to husband, or if a man Debtee takes the Debtor to wife, That is a release in Law, because they may not be sued, and personal Actions once suspended are perpetually suspended; But where the Executor of the Debtor is made Executor to the Debtee, he hath nothing thereby in his own right, but is only to use an Action in the right of another: And although she be Executrix to John Dorchester, yet when she hath fully administred all the Estate of the said John Dorchester, before she be made Executrix to Anne Rowe, she hath in a manner discharged her self of being Executrix to John Dorchester, and hath not any thing of his Estate. And they denied the Law to be as it is cited in Shepleys Case, That if an Executor pleads plene administravit, the Plaintiff may pray Judgment against him, when *Assets* comes unto him; but the Plaintiff is to be barred if he acknowledge it; and if he deny that he hath not fully administred, which is found against him, he shall be barred also, and pay costs to the Defendant: But the difference is, when it is found, That the Defendant hath some *Assets*, although of little value; so as he hath not fully administred, The Plaintiff shall have Judgment for the intire Debt, but he shall not have Execution, but of as much as is found, and shall not be barred for the residue; and if more *Assets* come afterwards, he may have a Scire facias to have execution thereof; but if it be found, That he hath fully administred, or if it be so pleaded and confessed, the Judgment shall be against the Plaintiff; and so are all the Presidents; wherefore here, she having fully administred all the goods of John Dorchester, and not being chargeable to that Debt, as Executrix to John Dorchester, she as Executrix of the said Anne Rowe may maintain this Action against the said Webb the other Obligor; wherefore it was adjudged for the Plaintiff. Vid. 8 Ed. 4. 3. 20 Ed. 4. 17. 21 Ed. 4. 81. 21 Hen. 7. 31. 11 Hen. 4. 83. 11 Hen. 7. 4. Coke lib. 8. fol. 136. Sir John Needhams Case.

Co. 8. 136. a. Co. Lit. 264. b. Pl. Com. 184. a. b. Post 551. Yelv. 160. 1 Rol. 920. Moor 855. 3 Cr. 114. Dier 140. a. 3 Cr. 150. Co. Lit. 264 b. Hob. 10. Co. 8. 134. Co. 8. 53. a. b. R. 404. 467. 468. Co. 8. 53. a. 1 Leon. 68. Ante 167. Moor 246. 46 E. 3. 9. 3 Cr. 318. 592. 1 Rol 934. R. 467.

Sir William Wallers Case.

SIr William Waller was endicted, for that he in the Palace of Westminster near the great Hall, the Justices in the Kings Bench, Chancery, and Common Bench, Judicially sitting to hear causes, 8. Jones 343.

causes, made an Assault and Affray upon Sir Thomas Reignolds, and beat him, in disturbance of the Law and contempt to the King, &c. and upon this, being arraigned and found guilty, Because the Endictment was not, That he did it in the presence of the Justices, nor in the presence of the King, all the Judges agreed, That the Judgment of the cutting off his hand should not be given, and so, seriatim, they delivered their opinions: But because this offence was in the Palace near the Hall door, whereby Tumults might have been made; and because it was found to be done, sitting all the Courts, and in disturbance of Justice and the Law, and in contempt to the King, the Court awarded, That he should be imprisoned for the said offence, during the Kings pleasure, and should pay one thousand pounds Fine, by the opinion of Richardson chief Justice, Jones, and Berkeley: And Jones and Berkeley would have parcel of the Judgment to have been, That he should make his submission in all the Courts of the Kings Bench, Chancery, and Common Bench, because the offence was made to the said Courts: But Richardson and I did not agree thereto, because there never was any such Judgment before, and for the Fine I conceived that 500 l. was sufficient, and it was awarded, That he should be bound with Sureties to his good behaviour. Vide 22 Ed. 3. 13. 39 Ass. 1. 19 Ed. 3. Judgment 17. 41 Ed. 3. Corone 280. 42 Ass. 18. 41 Ass. 25. Dy. 188. Stanford fol. 38. Trin. 19 Ed. 3. rot. 55. Carus Case 37 Eliz. Striking at the Court of Wards Stairs, only Imprisonment and Fine, Hill. 17 Eliz. rot. 6. inter placita Reg. Thomas Joans Endicted for Murder, apud *le* new Pallace Westm. 24 January an. 17 Eliz. cognovit judicium, manus amputatur. But it is not expressed, sedente Curia.

Termino

Termino Michaelis, anno decimo *Caroli* Regis, in Banco Regis.

Memorandum, In the Vacation, *viz.* in *Auguſt* 1634. *William Noy* (Atturney General) died at his houſe in *Brainford*, in the County of *Middleſex*: And Sir *Edward Coke* (who was Atturney General to Q. *Elizabeth* and to K. *James*, and afterwards chief Juſtice of the Common Bench, and then chief Juſtice of the Kings Bench, and in 14 *Jacobi* diſcharged of that place) died at his houſe in *Stoke*, in the County of *Buck*, in *September* 1634. being a prudent, grave, and learned man in the Common Laws of this Realm, and of a pious and vertuous life. He died in the eighty ſecond year of his Age. And in the ſame Vacation, *viz.* 14 *September*, the King at *Hampton Court* diſcharged and removed Sir *Robert Heath* from his place of chief Juſtice of the Common Bench, and within two days after, appointed Sir *John Fynch* of *Grays-Inn*, who was of the Kings learned Councel, and Atturney to *Henrietta Maria* the Queen) to be Serjeant at Law and chief Juſtice of the ſaid Court. Who the firſt day of this Term came unto the Chancery Bar, where, after a Speech made by the Lord *Coventry* Keeper of the great Seal, and his anſwer thereunto, was ſworn Serjeant at Law: And upon Monday (being the day of Eſſoyns of *Quindena Mich.*) appeared at the Common Bench Bar, clad and attired in his party coloured Robes and Habilaments of a Serjeant at Law, & counted upon a Writ of Right, *de precipe in Capite*, brought by the ſaid Queen againſt *Henry* E. of *Holland*, chief Juſtice and Juſtice in Eyre of all the Kings Foreſts, Chaſes, Parks, and Warrens *citra Trent*; and Steward of all the Queens Courts, &c. And the ſaid Sir *John Fynch* gave Rings, *quorum Inſcriptio fuit, Roſæ & Lilia dant purpuram*, and kept his Feaſt; and the next day, being Thurſday the 16. of *October*, was ſworn chief Juſtice of the Common Bench: And upon the Saturday following, arraied in his Judges Robes, and accompanied by the Earls of *Dorſet*, *Holland*, *Newport*, and forty other of Nobles, Knights, and Eſquires (the Society of *Grays-Inn*, and Inns of Chancery, and Officers of the Court attending him) was ſo brought unto the ſaid Court. 1.

And note that the foreſaid Sir *R. Heath* appeared at the Common Bench Bar the firſt day of this Term; and, being in his place of junior Serjeant at Law, pleaded for his Clients as Serjeant at Law: Which was done by the Kings ſpecial command, upon his humble Petition to his Majeſty; who, by advice of the Lords of his Councel, granted him leave to practiſe there, and in all other his Courts at *Weſtminſter*, excepting the Star-Chamber only. 2 Cr. 407.

And in this Vacation Sir *John Banks* (Reader of *Grays-Inn*) and the Ante 52, 65. Jones 350.

the Princes Atturney) was ſworn Atturney General: And Sir *Richard Sheldon* the Kings Sollicitor reſigned up his place, having obtained a new Patent, to be one of the Kings Learned Counſel, with the ſame Fee he had before (*viz.* 70 *l. per annum*) and with a privy Seal to have precedency before the Kings Sollicitor. And *Edward Littleton* of the *Inner Temple* (Recorder of *London*) was made the Kings Sollicitor.

Tylley *verſus* Peirce. Paſch. 10 Car. rot. 306.

2. DEbt, upon an Obligation of 600 l. conditioned, whereas the Defendant was to eſpouſe A. S. a Widow: If the Marriage took effect, and he ſhould ſurvive the ſaid A. S. That if within three months after his deceaſe there were paid to the ſaid Obligees 300 l. to and for ſuch uſes and purpoſes as the ſaid A. S. by any writing under her Hand and Seal ſubſcribed and publiſhed in the preſence of two witneſſes, ſhould nominate, declare, and appoint, Then, &c. The Defendant pleaded, that ſhe did not limit, declare, or appoint any uſe or purpoſe for the imployment of that money. The Plaintiff replies, that ſhe by her Will in writing, ſealed and publiſhed by her in the preſence of two witneſſes (naming their names) did thereby will and appoint ſuch ſums to be paid, And that the Defendant had not paid them. Whereupon the Defendant demurred. And now Rolls for the Defendant ſhewed the cauſe, For that ſhe ought to have made a Deed in writing, and not a Will, firſt, Becauſe it was not to have any effect until after her death, and it was ambulatory and revocable; and a *Feme* Covert may not make any Will. But the Court (Jones being abſent) held, That this Declaration was good: For although a *Feme* Covert may not
Ante 220. make a Will without her husbands aſſent, yet that Declaration in form of a Will, is good enough: And thereupon Richardſon cited a Caſe to be adjudged in the Common Bench when he was chief
Hob. 312. Juſtice there, upon a Conveyance, wherein was a Proviſo, that one might revoke the uſes by writing under his hand and ſeal. That a revocation by Will under his hand and ſeal, was adjudged a good revocation: And although the pleading was here, That the ſaid A. S. voluit & deviſavit, and not that it was appointed by her, yet
Ante 220. the Court held it to be well enough: For it is not properly a Will, being made by a *Feme* Covert; but a writing in nature of a Will: wherefore Rule was given, That Judgment ſhould be entred for the Plaintiff, unleſs other cauſe, &c.

Holmes Caſe.

3. WIlliam Holmes was endicted in London, for that he in
Jones 351. April 7 Caroli, being poſſeſſed of an houſe in London in Throgmorton Street, in ſuch a Ward for ſix years, remainder to Joh. S. for 3 years, the Reverſion to the Corporation of Haberdaſhers in

Fee.

Fee; De vi et armis, 3 April. ſeptimo *Caroli*, the ſaid houſe felonice, voluntarie, & malitioſe, igne combuſſit, ea intentione, ad eandem domum manſionalem, nec non diverſas alias domos manſionales diverſorum Leigeorum Domini Regis; adtunc & idem ſituat. et exiſtent. ad dictum domum manſionalem dicti *Willielmi Holms* contigue adjacent. adtunc et ibidem felonice, voluntarie, et malitioſe totaliter comburendo et igne conſumendo contra pacem. And upon this being arraigned at Newgate, he was found guilty: And before Judgment, this Endictment was removed by Certiorari into this Court. And it was argued at the Barr by Grimſton, That it was not felony. And now this Term at the Bench, and by Richardſon, chief Juſtice, Jones, and Berkeley, it was held, That it was not felony to burn an houſe whereof he is in poſſeſſion, by virtue of a Leaſe for years: For they ſaid, that burning of houſes is not felony, unleſs that they were ædes alienæ: And therefore Britton fol. 16. et Bracton fol. 146. et 27. Aſſ. 44. mentions, That it is felony to burn the houſe of another, and 10 Ed. 4. 14. 3. H. 7. 10. et 10 H. 7. 1 et Cok lib. 11. fol. 29. Poulters Caſe, which ſay, That burning of houſes generally is felony, are to be intended de ædibus alienis, et non propriis: And although the Endictment be ea intentione ad comburendum felonice, voluntarie, et malitioſe, the houſes of divers others contigue adjacentes, yet intent only without fact, is not felony. Alſo Berkeley and Jones held, that it cannot be ſaid to be vi et armis, when it is in his own poſſeſſion. Alſo Jones ſaid, that he could not be well endicted of felony, becauſe none of their names are mentioned who be the owners of the houſes adjoyning. But to that objection Berkeley and Richardſon agreed not. But I argued that the burning in the Endictment mentioned, is felony, becauſe it is capitale crimen, felleo animo perpetratum, which is the definition of felony in Cok. Lit. 391. a. Alſo by the rule in Bracton 146. Quod incendium nequiter, et ob inimicitias, factum capitali pœnâ puniatur; Si vero ſit incendium fortuitò vel per negligentiam, et non malâ conſcientiâ, non ſic punietur; ſed verſus eum criminaliter agatur. And it cannot be ſaid to be by negligence in anothers houſe; wherefore it is to be intended in his own houſe. Alſo this burning is found to be malitioſè, ſo it is mala conſcientia et nequiter factum. Alſo this burning of his houſe in a ſtreet of the City, adjoyning to the houſes of others, is to the endangering of the City, and therefore ought to be conſtrued to be felony; but ſo peradventure is not the burning of his houſe in the fields. And whereas it was ſaid, That the intention cannot make a felony, it was anſwered, That the intention here is coupled with an act of burning, and with the intendment of an act, which is felony, as 5 H. 7. 18. 7 H. 7. 42. 13 Ed. 4 9. Where a man delivers goods to one, and afterwards he that delivered them, privately ſteals them, to the intent to charge him, &c. 'tis felony. And whereas 'twas objected, That being his own poſſeſſion, it cannot be ſaid vi et armis: I anſwered, That vi et armis is well enough, where there is a Maleſeſance, as it is

3 Inſt. 66. 67.

Ante 325. in an action upon the Case. Vide Co. Lib. 9. fol. 50. b. Also every Endictment is vi et armis et contra pacem, where an act is done against the Commonwealth. So is it where a servant runs away with goods committed to his trust above forty shillings, although properly it cannot be said to be vi et armis, because they were in his custody. And in this case the ill consequence which might have fallen out by this act, makes the offence the greater; and the books in 10 Ed. 4. 14. 3 H. 7. 10. 11 H. 7. 1. & Stanford 36. Co. 11. 29. Co. 4. 20. a. put the case of burning of houses generally, and not of the burning of other mens houses. And it is an equal mischief in a Commonwealth, to burn his own in a City or Will, as to burn the houses of others, for the danger which may ensue. But the other three Justices resolved ut supra, that it was not felony; wherefore he was discharged thereof. But because it was an exorbitant offence, and found, they ordered, that he should be fined 500l. to the King, and imprisoned during the Kings pleasure, and should stand upon the Pillory with a paper upon his head, signifying the offence, at Westminster and at Cheapside, upon the Market day, and in the place where he committed the offence, and should be bound with good Sureties to his good behaviour during life.

Robodham *versus* Venleck.

4. 1 Vent. 337. ACtion for words. Whereas the Plaintiff exhibited in the Kings Bench Articles of the good behaviour against the Defendant, and made oath before Justice Whitlock (one of the Justices of the said Court) of the truth of them, that the Defendant spake these words of the Plaintiff, He (innuendo the Plaintiff) made a false Oath (innuendo the Oath aforesaid) before the Judge, (innuendo the said Justice) & I have that in my house, that can prove it. After Not guilty, and found for the Plaintiff, it was moved by Ball, That for these words an Action lies not, Because he doth not shew, there was any speech of the Plaintiff before, nor of that Oath: Also he doth not shew it to be a false Oath taken in any Court. But (absente Richardson) Jones, Berkeley, and my self held, That the Action well lies: For when it is alledged to be spoken falsly of the Plaintiff, that is sufficient without shewing, there was any speech of him. And when it was shewed, that Articles for the good behaviour were exhibited in the Kings Bench, and he sworn to the truth of them before Justice Whitlock, and he affirmed that this Oath is false, This is a scandalous speech, and charges him with perjury: For it is an Oath taken in a Court of Record; and it is not like to the Case alledged, That thou wert forsworn in *Whitechurch* Court: For this Court hath no cognisance, that Whitechurch is a Court of Record. And here, when the Defendant hath pleaded Not guilty, and is found guilty, that ascertains the Court, he spake those words of the Plaintiff, and concerning that Oath; Wherefore it was adjudged for the Plaintiff.

1 Rol. 39. Ante 177.

2 Cro. 90.

Merrick

Merrick *versus* Hundred de Rapesgate in Com. Glouc. Pasch, 10 Car. rot. 233.

ERror of a Judgment in the Common Bench: For that the Plaintiff had brought his Action against the Hundred upon the Statute of Winton 13 Ed. 2. of Hue and Cry, and the Statute of 27 Eliz. and Counts, that he was robbed in S. in loco vocat. the Highway, leading from L. unto Glocest. of such a summe, by persons unknown: and that he made Hue and Cry at Cotesford, in the said County, neer to the said place, where he was robbed, and gave notice of the said Robbery to the Inhabitants of Cotesford aforesaid: And that he was sworn accordingly before such a Justice of the Peace, that he was robbed of such a summ, and did not know any of the parties. And upon Not guilty pleaded, and found for the Plaintiff in the Common Bench, and Judgment there, Error was brought and assigned by Sir John Banks Attorney generall; Because he doth not allege, that Cotesford was a Vill within the Hundred; so as notice was given to the Inhabitants within the Hundred, where the Robbery was committed: For to give it to any of the Vills of another Hundred, is not within the intention of the Statute: For they will not regard it; because they shall not be charged with the loss. But all the Justices held, That it is not material it should be given to those of the Hundred, but to the inhabitants of the Vill next adjoyning, to the place where the Robbery was committed; For the words of the Statute do not mention, That notice shall be given to the Inhabitants of the Hundred: And Henden Serjeant said, it hath been adjudged, That Hue and Cry made, and notice given to the Inhabitants of the Villages next adjoyning to the place where the Robbery was done, although it be out of the Hundred and County, was good enough. But all the Justices doubted thereof, if out of the County; But although it were in a place in another Hundred it were well enough; For by intendment the party robbed, cannot know the Division of the Hundreds: But he ought at his perill to make it, in a Village neer adjoyning to the place, where he was robbed; Whereupon the Judgment was affirmed. Crawley Justice said, That in the Common Bench in an Action against the Hundred of Daccorn, upon a special Verdict, It was adjudged, That Hue and Cry made in the next Vill adjoyning, although it were in another County, was adjudged good. Quod vide antea fol. 41. 5. Ante 41.

Stevens *versus* Facone. Hill. 9 Car. rot. 1052

ERror of a Judgment in the Common Bench, in Quare impedit. Faucon had brought a Quare impedit against George late Archbishop of Canterbury, and the said Stevens for the Church of Newington in the County of Surrey, where the Plaintiff intitled 6.

himself by grant of the next avoidance: And that one Tobias Crisp was presented admitted, instituted and inducted thereto, and that the said Church became void, by the acceptance of a second Benefice above value. The said Archbishop pleaded a Plea thereunto; Whereupon it was Demurred. And Stevens pleaded a Plea and traverseth, That the said Tobias Crisp was admitted and instituted therein: And upon this, they were at Issue, and a Writ awarded to the Archbishop for that Triall; But afterwards, upon consideration of the said Plea of Stevens, It was adjudged an ill Plea, and Repleader was awarded; because the induction being alledged, ought also to have been traversed; wherefore the Defendant amended his Plea, and traversed the admission, institution and induction, and Issue was joyned thereupon, and tried for the Plaintiff. And after divers continuances and dayes in Banco, the Plaintiff shewed, That the Archbishop was dead since the last continuance, and prayed that there might be no further proceedings as against him, and to have Judgment against the Defendant Stevens upon the Verdict, which was granted him, and now Error brought. The first Error assigned, was, that the repleading was not well awarded; For the Issue which was joyned before the Writ awarded to the Archbishop, was well enough, and needed not any Repleader. But all the Court here held, That the Repleader was well awarded: For the induction being alledged as well as the institution, there ought to be a Travers to it, which alters the course of the Triall, as 22 H. 6. 27. & 2 H. 4. 17. are. So as it shall be tried *per pais*. The second Error assigned, was, That where the Allegation was, that the Archbishop was dead, and the Judgment Ideo consideratum fuit, that he should recover only, against the said Stevens, &c. It was not good; Because it is not entred, Et quia *le dit Stevens*, hoc non dedicit, ideo consideratum est, &c. For untill the other party confess or deny it, upon a surmise only of the part of the Plaintiff, without the Defendants joyning, the Court ought not to give Judgment; Wherefore for this cause it is Erronious. But all the Court held, That it was well enough; For the Archbishop being surmised to be dead; And the other Defendant by Triall of the Issue against him, being out of Court, either to count, plead, or confess it, the Court shall adjudge thereupon, according to the surmise of the Plaintiff, and shall proceed to Judgment against the Defendant only; Wherefore the Judgment was affirmed.

Pl.Com.529.b.

Ante 236.

Anonymus.

7. INdictment against J. S. and twenty seven others of Chelwick. For that they engrossed magnam quantitatem Straminis & Fœni apud Chelwick with an intent to sell it and make it the dearer. And it was moved by Robert Hide, that this Endictment was not sufficient; because he doth not say, that quilibet eorum ingrossed, for

for twenty eight may not ingross together. Sed non allocatur; For it may be that twenty eight may ingross and sell together, though it be not probable. The second exception, was, Because it is said, that they ingrossed 13. Jan. 9 Car. & 20. Maii 10 Car. at Chelwick, magnam quantitatem Straminis & Fœni, which is altogether incertain, not mentioning how many Loads of Hay and how many of Straw they ingrossed: And for that cause the Endictment was quashed.

Stile *versus* Finch.

ACtion for words, and declares, they were spoken 2 Car. And the Defendant pleaded Not guilty, and found against him. And now Adams moved in arrest of Judgment, that the Action is brought for words spoken so long time past, viz. six years before the Action commenced; so that by the Statute of Limitations he was debarred of this Action; and therefore the Court ought not to give Judgment upon this Verdict for the Plaintiff. But Jones and Berkeley held, That the Plaintiff ought to have Judgment; because the Defendant hath not pleaded the Statute of Limitations: For there may be divers causes, that he could not bring the Action before this time, viz. That he was in Prison, or within age, or beyond Seas, or that he had sued the Defendant to Outlawry, and the Defendant had reversed the Outlawry, and this Action brought within a year after the reversing of the Outlawry (as in truth the case was) for then the Action is well brought. But Adams moved, that he should have then shewn it in his Declaration. But it was adjudged for the Plaintiff. 8. 1 Rol. 47. Post. 404.

Stonehouse *versus* Corbett.

ERror of a Judgment in Waste, in the Com. Bench: The Error assigned, was, that divers Wastes being alledged, to some of them the Defendant pleaded *Null Waste fayt*; to others he pleaded justifiable Waste; To a third he pleaded a Plea in excuse of the Wast, And upon these pleas, issues were joyned, and a Venire facias awarded, reciting the issues, and commanding a Jury to be returned to inquire if the Defendant did commit the waste, as the Plaintiff hath declared. And for this cause Rolls assigned it for Error; Because they ought to have inquired of the several issues, as they be joyned: But because that divers Venire facias's were in this manner: And the inquiry, if waste be made as the Plaintiff hath declared, implies, that they shall inquire according to the several issues. If the waste were in such manner as the Plaintiff hath declared; otherwise the Verdict should be against him, The Court held it to be good enough, and no Error; wherefore rule was given to affirm the Judgment. 9. 2 Ro. 816. 7. Post. 400.

Houell

Houell *verſus* Barnes, in Chancery.

10. Jones 352. UPon a Suit in Chancery, A Caſe was agreed by the Counſell of both parties and referred to Iuſtice *Jones*, *Berkeley*, and *my ſelf*, to conſider and certifie our opinions. The Caſe was, One *Francis Barns* ſeiſed of Land in Fee, deviſeth it to his Wife for her life, and afterwards orders the ſame *to be ſold by his Executors hereunder named, & the moneys thereof coming, to be divided amongſt his Nephews.* And of the ſaid Will, made *Will. Clerk* and *Robert Cheſly* his Executors; *Will. Clerk* dies, the Wife is yet alive: Two queſtions were made. Firſt, Whether the ſaid *W. C.* and *R. Ch.* had an intereſt by this deviſe, or but an authority? Secondly, Whether the ſurviving Executor hath any authority to ſell? We all reſolved, that they have not any intereſt by this deviſe, but only an authority. Secondly, That the ſurviving Executor notwithſtanding the death of his companion may ſell; and ſo we certified our opinions. But whether he might ſell the Reverſion immediately, or ought to ſtay untill the death of the *Feme*, was a doubt. *Vid.* 30 *H.* 8. *Br. Deviſe* 31. 9 *Ed.* 3. 16. *Cok. Lit.* 112, 113. 136, 181, 8, *Aſſ.* 26.

Co Lit. 112. b. 3 Cr. 26.

Peard *verſus* Johnes.

11. 1 Ro. 55. ACtion for words. Whereas the Plaintiff was of the Middle-Temple for divers years, and called to the Barre, and gave Counſell to divers the Kings ſubjects, and practiſed the Law, and had married the daughter of J. S. That the Defendant having communication with the ſaid J. S. concerning the Plaintiff and the marriage of his daughter, ſaid of the Plaintiff, He is a Dunce, and will get little by the Law. To which words, the ſaid J. S. anſwering, That others have a better opinion of him, He replyed He was never but accounted a Dunce in the *Middle-Temple*. The Defendant pleaded Not guilty, and found againſt him, and damages to 100 marks. Bing Serjeant moved in arreſt of Judgment, that theſe words be not actionable; For an Action lies not, for calling one Dunce; For Dunce was a great learned man, and he was thereby compared unto him, and then no diſcredit: And Dunce is commonly ſpoken of one who is dull and heavy of wit, and though not ſo ready and nimble as others, yet he may be of a ſolid Judgment; Wherefore they ſeem not words of diſcredit. And to ſay, He will not get much by the Law, that may be, becauſe he will not give himſelf to practiſe. But all the Court ſeriatim, delivered their opinions, That the Action well lies; For the words are to be intended according to the common ſpeech: And Dunce in common intendment and ſpeech, is taken for one of dull capacity and apprehenſion, and not fit for a Lawyer, and words ſhall be taken in ſuch ſence as they are ſpoken, and they are alledged to be ſpoken malitiouſly, and to the intent to ſlaunder him in his Profeſſion:

1 Rol. 55.

fession: And so upon Not guilty pleaded, it is found, that he spake them malitiously: And for the words, that he will not get much by the Law; It is not to be intended, That he hath no will to practise, and to gain by his Profession: But he will not gain, viz. he will not deserve to gain, &c. Wherefore it was adjudged for the Plaintiff.

Morgans Case.

MOrgan and two others were endicted for counterfeiting twenty shilling pæces of the Kings Coyn, and Morgan for offering those pæces to the Kings Subjects, knowing them to be counterfeit. And being thereupon arraigned, he pleaded Not guilty, And evidence being pregnant against Morgan, he was found guilty, and the others were acquitted: And Judgment given, That he should be drawn and hanged; but not to be quartered, according to the opinion of Stanford 182. e. 12. 3 Inst. 15. 17.

Beale *versus* Beale.

DEbt upon an Obligation, conditioned for the performance of the Arbitriment of J. S. so as the same be delivered upon the 28. of February following, at the Shop of John Rolf Scrivener in Cornhill, &c. The Defendant pleaded *Nul tiel arbitriment.* The Plaintiff shews an Arbitriment 27. February, and what; And that he delivered it at the Shop of John Rolf Scrivener in Cornhill; and shews the breach. And upon this the Defendant demurred. One cause assigned by Grimston, was, For that the Arbitriment is said to be delivered the 27th. of February, and not the 28th. of February, nor is it averred to be delivered at the aforesaid Shop, nor to the aforesaid *John Rolf.* And it may be he hath removed his Shop, and then it is not intended, it should be delivered at the new Shop; or there may be another John Rolf. Sed non allocantur: For it shall not be intended another person nor another Shop, unless the contrary had been shewn. Secondly, Because the Arbitriment was uncertain, viz. to pay the charges in such a Suit. Sed non allocatur; For they are certain enough, when the Atturney hath made a Bill of charges: Wherefore it was adjudged for the Plaintiff. 13. R. 106. 1 Rol. 251.

Langden *versus* Stokes.

ASsumpsit. Whereas the Defendant, 2 Apr. 9 Car. (for such a valuable consideration) assumed to go such a voyage in such a Ship before August following, and alledges a breach in the non performance. The Defendant pleaded, That before any breach, the Plaintiff, the fourth of April at such a place, exoneravit eum of the said promise. Hereupon the Plaintiff demurred. And 14.

now

now Rolls for the Plaintiff alledged, that this pleading a discharge, without shewing how, was not good: and he cited divers books, 22 Ed. 4. 40. Quod indemnem conservet, or exonerabit, is no
2 Leon. 214. Plea. But Maynard for the Defendant argued to the contrary, that for as much as this was an Action grounded upon a Promise by words, it may be discharged by words, before the breach thereof; and therefore exoneravit generally is a good Plea: And he cited for this 3 H. 6. 36. And of this opinion was all the Court (absente Berkeley.) And Richardson said, that he knew it had been so re-
2 Cr. 483. solved divers times; and the Rule was remembred eodem modo
2 Cr. 620. quo oritur, eodem modo dissolvitur: Wherefore it was adjudged for the Defendant, quod querens nihil cap. per bil lam.

King *versus* Coke. Pasc. 10 Car. rot.

15. Jones 352. TResp. Quare clausum fregit pedibus ambulando et averiis depasc. &c. The Defendant justifies, because the place where, &c. tempore quo, &c. fuit solum et liberum tenementum of John Marquess of Winchester, and so justifies by his command. The Plaintiff replies, that this Land is parcel of the Manor of Abbots-Anns; and that William Marquess of Winchester was seized in fee of the said Manor, and levied a fine thereof to the use of himself and Lucie his Wife, for their lives, the Remainder to the Lord Edward Pawlet for an hundred years, if he lived so long; William Lord Marquess died, and Lucy his wife died; And that Edward Lord Pawlet entred, and let to him for one and twenty years; who entred and put in his Cattle, and avers the life of the said Edward Lord Pawlet. Et hoc, &c. And hereupon it was demurred, because this Replication doth not answer nor confess and avoid the Freehold of the said John Marquess of Winchester, alledged in the barr. But all the Court held, that the barr being a barr at large, the title in the Replication being at large, his claiming but a Lease for years is a sufficient and good Replication, without answering to the Freehold; Wherefore it was adjudged for the Plaintiff.

Vivian *versus* Shipping. Trin. 10. Car. rot. 1194.

16. 1 Ro. 415. R. 663. 763. ASsumpsit. That in consideration the Plaintiff assumed to stand to the award of J. S. and J. D. for certain matters and controversies betwixt them; and if he failed, to pay the Defendant forty pounds..... The Defendant assumed in the same manner to pay forty pounds to the Plaintiff, if he did not perform. And the Plaintiff shews, that the said J. S. and J. D. made an Arbitriment, that the Plaintiff should pay to the Defendant ten pounds, viz. upon the eighteenth of August following; and in consideration thereof, That the Defendant should be obliged to the Plaintiff in an Obligation of fourscore pounds, that the Plaintiff should enjoy such

such Copyhold Lands, during the life of the Defendant, or that he would upon request pay him forty pounds, and alledgeth in facto, That licet the Plaintiff performed the award on his part; and that he, such a day and place, required the Defendant to enter into such a Bond, according to the said promise, The Defendant had not sealed the said Bond, nor had paid him the forty pounds, according to his promise. The Defendant pleaded, Nullum tale fecerunt Arbitrium, and found against him. And now Rolls moved in arrest of Judgment, That this Declaration is not good; first, Because he doth not alledge the payment of the ten pounds; and the award is conditional in consideration thereof: so if he hath not paid the ten pounds, the other is not bound to make the obligation. Secondly, Because he doth not alledge a special request for the payment of the said 40 l. And the Assumpsit is to pay upon request, and without request, it is not payable. So not being specially alledged, the Action lies not. To the first Jones and Berkeley held, That it is a conditional award; and that there is a precedent condition, which if not performed, the other is not bound to make the Obligation. But I held the contrary, That it is not a conditional award, for it only appoints, that he shall enter into such a Bond; and every one hath remedy upon the promise, the one against the other, if they do not perform the award. But we all agreed, That although it be a condition precedent; yet when the Plaintiff saith, he hath performed the award on his side, it is intended that he hath performed it: And it is good in substance, though not in form; wherefore the Defendant might, if he would, have demurred: And when he hath not demurred, but pleaded to the issue, denying the award which is found against him, he shall not now have advantage of this matter of form. To the second they all agreed, when it is an Assumpsit to pay money, although it is upon request, The general allegation, Licet sæpius requisitus, is a sufficient allegation; and the bringing of the Action is a sufficient request for money: Whereupon it was adjudged for the Plaintiff.

Post. 386. 1 Rol. 415. R. 763. Post. 386. R. 69. Ante 35. 2 Cr. 102. 640.

Palmer *versus* Knights. Trin. 10 Car. rot. 225.

17. ASsumpsit. Whereas there was a contract betwixt the Defendant and one Cubit, concerning certain trees growing upon such Land. The Defendant in consideration the Plaintiff would cut down and carry the said trees to the Defendants house, assumed & promised unto him, That he would save him harmless of all damages & losses which might happen unto him by reason of such cutting down or carrying away, when he should be thereunto required: And he alledges in facto, That he cut down five of the said trees, and carried them to the Defendants house; And that the Defendant had not saved him harmless, licet sæpius requisitus, but suffered him to be sued at the Common Law for cutting down and carrying them away; whereby he was enforced to lay out divers sums of money

in defence of thoſe ſuits. The Defendant pleaded Non Aſſumſit, and found againſt him, and damages to thirty pounds: And it was now moved in arreſt of Judgment by Grimſton, That the Declaration is not good, becauſe he doth not ſhew in what Court he was ſued, nor what charges he expended, nor how he was damnified, being all in his own knowledge; wherefore he ought to have ſhewn the ſpecial breach, otherwiſe there is not any cauſe of Action. Sir William Denny moved, that the Allegation (That he was put to divers coſts and charges in defence of the ſuit) is ſufficient: And
Ante 385. although peradventure this had been cauſe of demurrer; yet having pleaded Non Aſſumpſit, and a Verdict found and damages aſſeſt, It appears he was damnified; wherefore it is now made good, and he ſhall not have advantage thereof. And of this opinion was Richardſon at the firſt, That the Verdict aids it, otherwiſe clearly it is not good. But Jones Juſtice and my ſelf held, That the Declaration was ill in ſubſtance, no breach being ſufficiently ſhewn; and being ill in ſubſtance, the Verdict cannot help it. And to that purpoſe Jones remembred a Caſe, betwixt Peck and
3 Bul. 297. Method, where an Aſſumpſit was, That he ſhould deliver ſuch an Obligation upon requeſt, after payment of ſuch a ſum. He alledges in facto, That the money was paid, and that licet ſæpius requiſitus, he had not delivered the Obligation. The Defendant pleaded Non Aſſumpſit, and found againſt him, and Judgment in the Common Bench for the Plaintiff, and Error brought, Becauſe it was not to be delivered but upon requeſt; So there ought to be
Ante 385. a ſpecial requeſt, which becauſe it was not made, and the year and place alledged of the requeſt, although the Iſſue was taken upon
2 Cr. 652. the Aſſumpſit and found, yet it was not good: But the Judgment was reverſt, which Richardſon remembred; wherefore he agreed, That the Declaration was not good, nor aided by the Verdict; whereupon Judgment was given for the Defendant.

Hopehill *verſus* Searle. Hill. 9 Car. rot. 269.

18. EJectione firmæ. Upon a ſpecial Verdict the Caſe was,
2 Rol. 247. That an Abbot an. 21. H. 8. made a Leaſe for octoginta & terdecem annos. The queſtion was only, Whether in this caſe terdecem annos ſhall be ſaid to be thirty or thirteen years? And Preſcot for the Defendant argued, That it ſhould be expounded for thirty years, becauſe it ſhall be taken moſt ſtrong againſt the Leſſor, when there is no proper word for thirteen. But all the Court held, That it ſhall be taken according to the Common *parlance*, for thirteen years, terdecem and treſdecem are all one, and it is ſo writ Euphoniæ gratia; and it being one intire word, cannot be otherwiſe taken. But if it were written as ſeveral words, it ſhould be otherwiſe;
Ante 53. Co. 10 133. a. Wherefore without further argument, it was adjudged for the Plaintiff. And as Baall for the Plaintiff urged, It being after Octo-

ginta

ginta annos, it shall the rather be so intended; For if he had meant it for thirty, it should have been one hundred and ten years. But being so writ, they agreed, It was for ninety three years, and no more; wherefore it was adjudged accordingly for the Plaintiff.

Baker *versus* Hacking. Hill. 8. Car. rot. 347.

19. Jones 358. Hutt. 126. 1 Rol. 633.

UPon a special Verdict, The Case was, John Coster Tenant in Tail, the Reversion over to Robert Coster in fee, they joyn in a Lease for life by Deed: And afterwards he in the Reversion, during the Lease for life, deviseth that Reversion and dies: Afterward Tenant in Tail dies without issue. The question was, Whether this devise be good or not? And it was argued at the Bar by Rolls for the Plaintiff, and by Maynard for the Defendant; and the doubt was, If Tenant in Tail joyns with him in Reversion in a Lease for life, not warranted by the Statute; so as it is a greater Estate than Tenant in Tail can make, whether it be a discontinuance of the Tail only, or a discontinuance of the Reversion also? For if it be a discontinuance of the Reversion, then the devisor had not any power to devise. But Jones and I held, upon the first motion, That it is not any discontinuance of the Reversion, because he joyns with the Tenant in Tail: And it is quasi a confirmation of the Lease, during the life of the Tenant in Tail, and during the time that he hath issue: But after his death, without issue, it is the Lease of him in the Reversion: And, during the life of the Lessee, it is a discontinuance quoad the Tenant in Tail and his issue: But it is not so as to the Reversion; for that remains as it was. And Richardson inclined to this opinion; but Berkeley doubted; whereupon it was adjourned till the next Term. Post. 405.

Hinsley *versus* Wilkinson. Hill. 8 Car. rot. 302.

20. Jones 356. 1 Rol. 405. 90.

ERror of a Judgment in the Common Bench, in an Action upon the Case. Whereas the Plaintiff had declared, That he was a Copyholder of the Manor of Lull, whereof a great Waste, called Lull Waste, was parcel, And the Copyholders of the Manor having Common there, That the Defendant being seised of parcel of a Wood called Lull-wood, adjoyning to the said Common, maintained Coneys in the said Wood, which run out thereof into the Common and eat up the Common; whereupon the Action was brought. The Defendant traversed the Prescription to the Common, and it was found against him, and Judgment given. And now Germin for the Plaintiff in the Writ of Error moved, That this Declaration was not maintainable; because none can say when Coneys are upon the Common, whose Coneys they be: And they cannot be said to be the Defendants Coneys more than any others, for being out of his Soil he hath no interest in them more than any

other, they being feræ naturæ; so as he hath not any property in them until he takes them: and therefore Fitzh. N. B. 87. & 89. saith, they shall not be said Cuniculos suos, nor Pisces suas in common Rivers: And although the Commoner hath loss, yet it is without injury by the Defendant. And Grimston likewise for the Plaintiff, urged further, That if this Action should be maintainable there would be multiplicity of Suits; for every Commoner would have an Action, which ought not to be suffered: And here is no more cause of Action than when one suffers his Doves to fly into the Corn adjoyning; for which clearly no Action lies: For it cannot be known whose Doves they be, and the Commoner is not at any mischief, for he may kill them if he can: And for that point cited Co. 5. fol. 104. b. Borastons Case. And so held all the Justices here, besides Berkeley, who doubted thereof; wherefore Rule was given, That the said Judgment should be reversed, if upon such a day, the next Term, other cause was not shewn, &c. which was done to the intent there might be conference with the Justices of the Common Bench, to know if it had been moved in the Common Bench, or if it had passed sub silentio, being after Verdict: And the same day I conferred with Hutton, Vernon and Crawley, Judges of the Common Bench, if they knew any such Case had been moved in their Court, and they all said, they did not remember any such to be there moved, but that it passed sub silentio: And they all held, That an Action upon the Case lies not for a Commoner, But he may kill them; for none hath any property in them; wherefore the Judgment was afterward reversed.

Co. 7. 17. b. Post. 554.

Moor 421. 1 Rol. 90. Co. Lit. 56. a.

2 Cr. 195, 492.

Bull *versus* Wyatt.

21. 1 Rol. 661, 662, 865.

EJectione firmæ, for a Garden in Bristol. Upon a special Verdict. The case was, One Reignald and his wife, being seized in Fee in right of his wife, by Indenture with Letter of Attorney to make livery, lets that Garden, Habendum à die datus, for life of the Lessee, rendring six shillings eight pence per annum: And the Attorney made livery the same day, secundum formam Chartæ: The Lessee enters and paid the rent, which was always received; the wife dies; her heir, without entry, suffers a common recovery, to the use of the Plaintiff. The question was, Whether this were a good recovery? Rolls for the Plaintiff argued, That the Leale was void, and that livery the same day it bears date, is void, to make it a good Lease. And so held all the Court, and would not admit it to be argued. Secondly, Admitting it to be a void livery, yet he held, that entring and paying his rent, he is but tenant at will; As one entring without livery, is tenant at will to the Feoffor: And he cannot be a disseisor without an intent in him to make a disseisin, and without the intent of the Lessor to have it to be a disseisin; and he is accounted in Law but as a tenant at will: And

Ante 94. 2 Cr. 153. 1 Rol. 828.

1 Rol. 662.

Ante 304.

And for proof thereof, he relied upon 28 Ass. 11. & 1 Ed. 3. Ass. 7. and the Case in this Court Pasch. 9 Car. betwixt Blunden and Baugh, Co. lib. 4. 73. 11 H. 4. 29, 30. 9 H. 6. 6, 7. Thirdly, Admitting it was a Disseisin, yet suffering a recovery, he and all under him are estopped to say he was not Tenant of the Freehold. Wherefore the recovery is good. And to that opinion the Court inclined: But because there were none of the Defendants part in Court, no Judgement was then given; But ruled, that if cause were not shewn, &c. Judgment should be entred for the Plaintiff. Ante 304. 1 Rol. 865.

Prouses Case.

PRouse, an Atturney of the Kings Bench, was elected Tythingman of Taunton: In which Town a custome is pretended to be, That every one shall be a Constable or Tythingman, according to their several houses; and he having purchased two houses in the same Town, was, in a Lect there held, elected Tythingman: And thereupon he brought a Writ of privilege to be discharged, because he is to be attendant in this Court. But the Justices of Peace would not allow thereof, but desired the Justices of Assise to direct whether it should be allowed, who would not meddle therewith, but ordered, It should be moved in this Court: Whereupon Maynard now moved, That this Writ is not to be allowed; For although in truth Atturneys and Clerks of the Court have such a privilege to be discharged when they are generally elected, because their Attendance being required here, they shall not be compell'd to attend such an Office; yet when there is a special custome, That they shall be elected in course, according to the situation of their houses, that custome ought to prevail against such privilege: For otherwise one Atturney may purchase many of the houses in the Town, and then there shall not be sufficient persons to do the service. As in truth in this Case, he hath purchased seven houses in the said Will, wherefore he ought to be charged. But all the Court held, That it cannot be a good custome; For then a woman, being an Inhabitant in one of the said houses, it may come to her course to be Constable, which the Law will not permit. So this custome pretended cannot hold place against a person who is, by his Office, to be attendant here: whereupon it was ordered, That he should be discharged. 22. Noy 112. 113. R. 298. R. 100. Post. 585.

Stevensons Case.

STevenson being in Execution for a Debt to the King, adjudged against him in the Exchequer, was condemned here in this Court in Debt, by a Judgment, and was brought to the Bar by Habeas Corpus, to be charged in Execution for this Debt also. And now Bing Serjeant moved, That he ought not to be charged in Execution here, because he is in Execution at the Kings Suit; For it 23. St. 25 E. 3. c. 19

it is appointed by the Statute of 25 Ed. 3. cap. 19. That a common person shall not have Execution against the Kings Debtor, until he makes agreement for the Kings Debt, and then he shall have his Debtor in Execution, and detain him until he hath made satisfaction of the Debt due to himself, as also of the Debt which he paid for him to the King. Of that opinion was the whole Court: But for as much as he had not a Writ of protection, the Court resolved, That he is out of the Statute; and thereupon awarded, That he should be in Execution as well for the party as for the King.

2 Cr. 477.

Hob. 115. Co. Litt. 131. b.

3 Cr. 164.

Griffyths Case.

24. 1 Rol 486, 487

SCire facias versus Griffyth, upon a Recognisance for the Peace, taken 9 Maij 9 Car. The first Exception taken by Grimston, was, Because the Recognisance was Garderet pacem, whereas, it ought to have been, Conservaret pacem. Sed non allocatur; For so are many of the presidents, and it is as well as Conservaret pacem. Secondly, Because that the Recognisance is, That he shall appear at the next general Quarter Sessions for the said County, and in the interim *Gardera le peace*. And it was alledged, That after the Recognisance taken, and before the next general Quarter-Sessions, viz. 29 Junij, 9 Car. he assaulted one Such, and beat him, and so brake the peace. The Exception was, Because he did not shew the day of the nexr Sessions. And I was of opinion, That for this cause it was ill; for he ought to ascertain the Court when the next Sessions was, and so that the breach of the Peace was before the said Quarter-Sessions: But Richardson, Jones, and Berkeley held, the Allegation, That the breach was after the date of the Recognisance, and before the next Sessions, sufficed. But they would advise until the next Term.

Termino

Termino Hillarij, anno decimo *Caroli* Regis, in Banco Regis.

Netter *verſus* Percivall Brett. Mich. 10 Car. rot. 132.

PRohibition being granted, to ſtay a Suit for the Probate of a Teſtament concerning Land and Goods; wherein the Land was charged with a Condition in part for payment of certain Legacies, it was prayed to have a conſultation. And Jones and Berkeley agréed, that they ſhould have a conſultation; Becauſe the probate of Teſtaments properly appertains to the Spiritual Court, and the probate or non probate cannot be any prejudice to the heir, nor to him who claims the Land by the Deviſe; And an inconvenience would enſue, if there ſhould not be a probate concerning the perſonal eſtate, That the Executors might not have any Actions for Debts, nor diſpoſe of the Goods. And therefore Jones ſaid, he had ſéen the Record of the Marqueſs of Wincheſter's Caſe, Coke lib. 6. fol. 23. Where the Will being for Land and Goods, conſultation was granted generally. But I doubted thereof, becauſe the Land is the principal, and they have no authority to meddle with any Will concerning Land; and there might be an inconvenience, if the Will there ſhould be countenanced or diſcountenanced concerning the Land. And becauſe there was a Prohibition granted, I was of opinion, the parties ought to purſue the uſual courſe, which is, that the Defendant ſhould appear, and the Plaintiff declare; and then upon demurrer it might be adjudged, and not upon a motion. But the other two Juſtices (Richardſon chief Juſtice being ſick and abſent) gave a Rule, That if other matter were not ſhewn, &c. conſultation ſhould be awarded. Vide reſiduum poſtea, fol. 395. 1. Jones 355: 2 Rol. 315, 316.

Gymlett *verſus* Sands. Trin. 8 Car. rot. 678.

EJectione firmæ of a Leaſe of Hugh Boſcovele. By a ſpecial Verdict it was found, That Humphry Martin was ſeized in Fée, and had Iſſue John Martin by Hebell his wife, who by Indenture, in conſideration of love to his ſaid wife, and to John their ſon and heir apparent, and to ſettle the Land upon him and his heirs, enfeoffed A. B. and others, to the uſe of himſelf for life, without impeachment of Waſte; and after, to his wife for her life; and after to 2. 1 Rol. 856. 2 Rol. 421, 701, 741.

to the uſe of the ſaid John Martin and the heirs Males of his body; Remainder to his right heirs. And afterwards the ſaid Humphry, in quinto Jacobi, infeoffed John Smith by Indenture, with warranty againſt all perſons; and afterwards, in ſexto Caroli, died. Hebell the wife enters, John the ſon enters, upon John Smith, and enfeoffed Boſcavele the Leſſor with warranty; John Smith enters, then Boſcavele the Leſſor enters, and makes the Leaſe in the Declaration mentioned; The Defendant, as Servant to John Smith enters and outs him: They found that the ſaid Hebell was yet alive; Et ſi ſuper totam materiam, &c. And hereupon Rolls argued for the Plaintiff, firſt, That the Leſſor of the Plaintiff hath good title; For he claims by the wife and the ſon, which ſon hath good title to the remainder clearly; And the wife hath a good eſtate for her life; And they had a good title to enter and infeoff the Leſſor of the Plaintiff, unleſs it were by reaſon of this warranty: And it is not found, that the ſon is heir to this warranty of the Fathers; For although it be found, That the ſaid Humphry had iſſue by the ſaid Hebell his wife, the ſaid John in remainder, unicum filium ſuum; yet it is not found, that he is heir: And it may be that he had other elder ſons by a former Venter; And the Court will not intend a warranty by ſuppoſition. Secondly, This feoffment by the wife joyning with John, who hath the remainder, is no forfeiture, without finding, That ſhe had notice of the feoffment and warranty: For
Co. Lit. 215.b. as Cok. lib. 5. fol. 113.b. Mallorys Caſe, Bargainee by Deed inroll'd ſhall not enter upon the Leſſee for non-payment of the rent, unleſs it were ſhewn, that he had notice. And ſo lib. 8. fol. 92.a. Francis Caſe, Maynard to the contrary for the Defendant, firſt, He ſhall be intended heir, rather than otherwiſe in a ſpecial Verdict, Becauſe it is found that he had him unicum filium ſuum; and it ſhall not be intended there were more ſons, without ſhewing. To the ſecond, That it is a forfeiture; For ſhe ought to have taken notice at her peril, when none is bound to give notice, as here none is bound: And there is a difference betwixt a condition, and this voluntary Act of the Feoffment, which is a forfeiture. And afterwards Jones and Berkeley delivered their opinions, That this warranty is no bar, Becauſe it is not found that he was heir; and the rather it ſhall be intended
Ante 371. that he is not heir, becauſe it is a collateral warranty, which is not to be favoured; And it may be that he had elder ſons by another Venter; or there might be an Attainder. But I held the contrary, That the Verdict in this point was well enough, and found him heir; for it is found that the Indenture calls him filium & hæredem ſuum apparentem; and a plurality of ſons ſhall not be intended; and in a ſpecial Verdict intendment ſufficeth, eſpecially as this caſe is, Becauſe if he be not heir, there is no colour to have a ſpecial Ver-
Ante 22. 130. dict. Vide Coke lib. 5. Goodales Caſe, 97.a. That the Verdict ſhall be taken by intendment. For the ſecond point they all reſolved, That
1 Rol. 856. Co. 1.76.b. if the warranty had been well found, it were apparent, That the Eſtate of the ſon was bound, and her joyning in a Feoffment with

the

the Son, is a forfeiture as if she had joyned with a Stranger who had nothing to do therewith; and that she at her peril ought to take notice of the said Feoffment, because the delivery is a publique and notorious act, and the Feoffment is a forfeiture at the Common Law; and it is not like a condition, which is taken strictly: and she ought at her peril to take notice of this act upon the Land, none being bound to give here notice: wherefore as to this point, they all agreed; But upon the first point they would advise. R.653. R.655.

3.

MEmorandum, That upon the fourth of February, *anno decimo Caroli Regis*, *anno Domini* 1634. *circa horam undecimam ante meridiem* Sir *Thomas Richardson* Knight, chief Justice of the Kings Bench, dyed at his house in *Chancery-lane*; And all the Writs which were sealed that day bare *Teste. Thomas Richardson*; and all those which were sealed the next day, bare *Teste*, *William Jones*, he being second Justice of the Kings Bench.

Meade *versus* Thurman.

4.

PRohibition was prayed upon suggestion of this Custome, That for Tares cut or mown before they be ripe, and given to Plough-Cattle, Tythes ought not to be payed: And upon another custome for Headlands sown with Corn, used to be fed with Plough-Cattle, or mowed and cut for that purpose, That the owners shall be discharged of Tythes. And upon this suggestion grounded upon special customes, the Court granted a Prohibition. Jones 357. 1 Rol. 646. 1 Cr. 189.

Dymmock *versus* Fawcett. Mich. 10 Car. rot. 148.

5.

AN Action for words. For that he said of the Plaintiff and to the Plaintiff, being of good fame, and one who had served as Captain in the warrs, hæc verba in London, Thou art a Pimp, avering, that in London that word was known to be intended a Bawd; And further said, that he was a common Pimp, and notorious, which he would justifie. After Verdict for the Plaintiff, Littleton (the Kings Solicitor) moved in arrest of Judgment, That these words be not actionable; For it is a meer spiritual slander, as whore or Heretique, and punishable in the spiritual Court, and not at the Common Law; And he said that divers times Suits have been in the spiritual Court for such words, and Prohibitions prayed and never granted, Vide 27 H. 8. 14. But to say that he keeps a Bawdy house, is presentable in the Leet, and punishable at the Common Law. Ward è contra, Because it is spoken of one of an honourable Profession, viz. a Souldier, and trenches to his disreputation, to be tared with such a base offence; And he said, that such offences have been divers times punished in London by corpo- 1 R. 44. R. 345. Stiles 326. Ante 229.

Ante 350. Ant. 329. Post. 457. Hob. 126. 6. Moor. 10.

tal punishment. But it was answered, That was by custome; and there the calling one whore is actionable. Jones Justice held, That the Action lay not. And we all agreed, that the expolition and averment, That Pimp is known to be a name for a common Pandor is good. Berkeley and I agreed, that the words are very slanderous, and more than if he had called him Adulterer or whoremonger; for this is an infamous offence, to be a Solicitor for others for such base offices. And it tends to the breach of the Peace, to use such a course of life; and he may be indicted and punished for it corporally: Wherefore, by the assent of Jones, rule was given, That Judgment should be entred. But afterward, Term. Mich. 11 Car. it was moved again: And Jones holding his first opinion, Brampston agreeing with him, the Judgment was stayed.

Nichols *versus* Walker and Carter. Trin. 10 Car. rot. 222.

6. Ante 92. 93. Jones 355. 2 Rol. 560.

TRespas. For entring into his house in Tatridge, and taking of a Fowling peece and other goods. Upon Not guilty, a special Verdict was found; that Carter was Church-warden of the Parish of Hatfeild and Walker was Overseer of the Poor of the Parish of Hatfeild; and that the 16 of Novemb. 1632. a Rate was made by the Inhabitants of Hatfeild, for relief of the Poor of that Parish, according to the Statute; And that the Plaintiff was an Inhabitant in Tatridge, having not any Lands in Hatfeild, but having Lands in Tatridge, and was rated by the said Rate at twelve pence the Month, towards the relief of the Poor of Hatfeild; And that the said Rate, upon the 20 April 1632. was allowed by two Justices of the Peace of the said County, whereof one was of the Quorum, according to the Statute: And that they demanded this sum of the Plaintiff, and he refused to pay; wherefore, by warrant of three Justices of the Peace, to levy that sum upon his Goods and Chattels, they, by virtue thereof, distrained those Goods, and sold them for twenty shillings, and offered the residue to the Plaintiff: And they found that anciently the Village of Tatridge was parcel of the Parish of Hatfeild, and that there was not any legal act, to sever the said Vill from the Parish of Hatfeild, Quodque modo & ante tempus cujus, &c. the Tythes of Tatridge were payed to the Parson of Hatfeild; And that the Parson of Hatfeild used alwaies to find a Curate at Tatridge, And that there is no Parson at Tatridge; And that for threescore years past and more, and at the time of the making of the Statute of 43 Eliz. cap. 2. for relief of the Poor, & semper exinde usque hunc diem, dicta Villa de Tatridge communiter reputata fuit esse Parochia de se, & per totum idem tempus Constabularios, Gardianos Ecclesiæ, & Supravisores Pauperum dictæ villæ de Tatridge habere consueverunt per electionem Inhabitantium ibidem; And that for all the said time, Rates, Assessments, & Levies have been made there by them, for the relief of the Poor

Poor of Tatridge, which rates, during all the said time, have been used to be levied by their proper Officers for relief of the Poor there, without any paying to the Poor of Hatfield, or joyning in any assessment with the Town of Hatfield: And that the Church of Tatridge, during all that time, have had all Parochial Rights: And that the Inhabitants of Tatridge have not used all that time to contribute to the reparation of the Church of Hatfeild, but to the reparation of their own proper Church and Chappel only. Et si super totam materiam, &c. And after argument at the Barr by Brian for the Plaintiff, and by Atkins for the Defendant, the Court resolved, That Judgment ought to be given for the Plaintiff: For Tatridge being a Parish in reputation so long before and after the Statute, and at the time of the Statute made, It shall not be now for this purpose charged by Hatfeild; But it shall be charged by it self, and for their Poor only. And they relyed upon a Judgment given in the Common Bench Mich. tertio Caroli, betwixt Hilton and Pawle. Quod vide ante fol. 92. 3. Secondly, Atkins moved Although it should be allowed, that the Inhabitants of Tatridge be not chargeable with these rates, yet upon this Verdict the Defendants be not guilty, Because they did it by Warrant from the Justices of Peace; so they did it as Officers, and therefore excusable. Sed non allocatur; For the rate being unduely tared, the warrant of the Justices of Peace for the levying thereof will not excuse. And it is not like where an Officer makes an Arrest by warrant out of the Kings Court, which if it be Error the Officer must not contradict, Because the Court hath general Jurisdiction: But here the Justices of the Peace have but a particular jurisdiction, to make warrant to relieve Rates well assest: Whereupon it was adjudged for the Plaintiff.

Hob. 67.

Ante 93.

Co. 10. 76. Post. 602.

The Case of Netter *versus* Percivall Brett, Ante pag. 391.

WAs argued by the Justices seriatim. And Jones and Berkeley agreed, that consultation shall be granted to prove the Will, Because it is one intire will, although it be made as several wills: For that he first made his will concerning his goods, and makes the Defendant his Executor, and appoints therein divers Legacies; and after in the same paper, leaving the space of a line void, he writes in this manner, That if his personal Estate shall not suffice to satisfie his Legacies and Debts, He appoints part of the profits of the Land to his Executors for a time: And in conclusion of the will, In witness whereof, to this my Will I have put my Hand and Seal, and thereto subscribed his name and put his seal. So it appears to be all one intire will: And therefore Berkeley said that he would insist upon two rules, first, That the probate of Testaments for personal things, appertains only and properly to the Spiritual Court: And for the probate of such Testaments, no Prohibition lies. Secondly, That the probate of Testaments

7. 2 Rol. 678.

concerning Lands only, and no goooods contained therein, ought not to be proved in the spiritual Court by compulsion, although they may be proved there: And if there be a Suit to compell any to prove such Testaments in the spiritual Court, a Prohibition lies: and commonly such wills where the Lands are devisable by custome, are proved before the Ordinary; and therefore the Register 246. mentions, that wills of Land in London are first proved before the Ordinary, and after before the Major in the Hustings. And in Boroughs a devise of Lands by custome, is as a devise of Chattels, and so termed and reputed. Then when a Will is concerning Lands and Goods, and is one entire will (as the conclusion of this will makes it) and in the will of the Land is a clause, That the profits of the Lands shall be for the performance of the Will, so as it is a mixt will, It is reason it should be proved intirely in the spiritual Court, to enable the Executor to sue for Debts, and to expedite the payment of the Legacies, which otherwise might be longer delayed. And the probate of the will for the Land will not prejudice the Heir; for it shall not be evidence at the Common Law; nor the witnesses being there examined, their examinations shall be given in evidence at the Common Law. And Berkeley cited the resolution and agreement of all the Judges before the King, that where a Testament is made of Land and Goods, no Prohibition lies to stop the probate of the said Testament for the Goods: And that in such case, the Testament being mixt of Land and Goods, probate shall be of the entire will, and ought not to be of parcells. And he likewise cited the Case 9 Eliz. Dy. 254., That Land was devised to be sold for payment of Legacies, the Land being sold, the suit, for the money to be distributed, may be in the spiritual Court; contrary to the opinion in 4 & 5 Phil. & Mariæ, although it be rising out of the Land: And Jones Justice agreed with him in respect of the inconvenience which otherwise might ensue, if the probate of the Testament for the goods should be deferred, And they both held, that a consultation shall be awarded. And although it is here granted upon motion without special pleading and demurrer, Yet Jones said, it was good enough; for anciently in this Court, there were no Declarations and suggestions upon Prohibitions, but they were granted upon motions: And consultations were granted upon motions without demurrer, as in the Common Bench. But I argued to the contrary, First, that the Prohibition is well granted, and upon good grounds, and therefore a consultation ought not to be awarded. Secondly, If it should be awarded, yet it ought to be after Plea and Demurrer; so as the matter might appear in pleading, for what cause it is granted. To the first, that it is well granted, because the Prohibition, as it is drawn and granted, doth alledge, that the Testament is made of the Land; and no mention of the goods, and thereby is endeavoured to make a probate of this Testament,

R. 88.

Co. 6. 23. b.

2 Cr. 346.

Ante 115.

R. 101.

Ante 166.

Ante 115.

ment, which concerns Lands only, and so to draw into question laicum Feodum, and always in such cases, a Prohibition was granted: Ante 94.
And whereas in the Register it is said, that the probate of Testaments in London, is first before the Ordinary, and then in the Hustings, It was answered, that is alledged to be by special custome, which proves that without special custome, it ought not to be proved there. And to the resolution of the Justices, that a Prohibition shall not be granted to stop the probate of a Testament for Goods, where it was made for Land and Goods, that doth not prove, that a Prohibition may not be granted, to stop the probate of a Testament for Lands; And as my Brother Berkeley said, Testaments of Land only, shall not be proved in the Spiritual Court, 2 Rol. 316.
and a Prohibition shall be granted, if they so do: So here, for any thing which appears to the contrary, and as it is supposed in the Prohibition, the Court as Judges cannot take conusance that it is otherwise: And although the Copy of the Testament be shewn unto us, that it is in one entire Paper, and one Seal, and the other circumstances before mentioned, yet that is but private information, of which we are not to take cognisance, as of matter of Record: And I assented unto the case in 9 Eliz. but upon this reason because the Land being sold, the money is personal, and Assets in the hands of the Executors; so as it savours not of the Realty being executed. Secondly, I held, that if consultation should be granted it ought not to be in this manner, contrary to the usual course, upon a motion, without pleading and demurrer: And as it is here upon an interlocutory speech at the Barr only, the ground thereof not appearing of Record: And inconvenience would ensue if such course should be suffered; for the party might be prejudiced, and peradventure erroniously; and yet he should not have his Writ of Error: And for this very cause divers presidents have been, where Prohibitions were granted: As in the case of the Marquess of Winchester Lib. 6. 23. a. b.
Mich. 38 & 39 Eliz. rot. 355. inter Lloyd and Lloyd, Mich. 3 Car. in the Com. Bench. Westlys Case, Mich. 5 Car. in B. Reg. betwixt Ante 94. 166.
Hill and Thornton, Where a Prohibition being granted, and a Tryall, whether it was a good Will? and found good; yet a consultation was granted only for the Goods: But here in this case a consultation was granted generally.

Miller and Johns *versus* Maynwaring.

8.

ERror of a Judgment in Chester, in Ejectione firmæ of Lands in Blacon, of the demise of Sir Randolph Crew, the 12 of Aug. 4 Car: where, upon a special Verdict, it was found, That John Earl of Oxford and Elizabeth his wife, in right of the said Elizabeth, were seized in fee of the Manor of Blacon, whereof the Land in question, is parcel, and had issue John: And after the said John Earl of Oxford by Indenture the 10. of Febr. 27 Hen. 8. let that Manor to Anne Seaton for thirty four years, that afterward Elizabeth died, 29 H. 8. and on the 21 Martii, 31 H. 8. the said John Earl

Jones 354. 1 Rol. 849. 2 Rol. 29. 44. Post. 502.

Earl of Oxford died, afterward 30 Julii; 35 Hen. 8. the said John the Son, then Earl of Oxford, by Indenture reciting the Lease to Anne Seaton to be dated 10 Feb. 28 H. 8. let the said Manor to Robert Rochester, Habendum after the end, surrender, or forfeiture of the said Lease to Anne Seaton for thirty years: And they find, that after the making of the said Indenture, the said words, 28 H. 8. were raised and altered, and made 27 Hen. 8. And that afterward viz. 26. Martii, 35 H. 8. the said John Earl of Oxford, by Indenture betwixt him and Hamlet Freere, (reciting the Lease to Anne Seaton, 10 Feb. 27 H. 8.) granted the reversion of the said Manor and premisses to the said Hamlet Freere, Habendum the said Manor and premisses from such time as the same shall revert and come to the possession of the said Earl or his heirs, by surrender, forfeiture or otherwise, for sixty years: That afterward in 4 Eliz. the said John Earl of Oxford died seized, and the said Manor descended to his Son Edward Earl of Oxford, That he by Indenture betwixt him and Geffry Morley, dated 14. Julii, 15 Eliz. reciting, whereas John his father by Indenture, 30 Julii, 35 H. 8. demised to Robert Rochester the said Ferm or Manor of Blacon, Habendum for thirty years, from the end or determination of the Lease made to Anne Seaton, dated 10 Feb. 27 Hen. 8. for twenty four years (which is a false recital; for in Rochesters Lease it is recited, that the Lease to Anne Seaton, was dated 10. Feb. 28 H. 8.) and regranted the Lease to Hamlet Freere for sixty years, to begin after the expiration, surrender or forfeiture, (omitting the words, or otherwise) of the Lease to Anne Seaton: The said Edward Earl of Oxford demised the said Manor and Ferm of Blacon, to the said Geffery Morley, Habendum from the end of the said Leases for fifty years. And if, &c. So the question was, whether any of these Leases, to Hamlet Freere or Morley be good, and were in esse at the time of the Lease made by Sir Randolph Crew; For Sir Randolph Crew claimed the Inheritance of the Manor from the Earl of Oxford, and Sir William Norris claimed the Leases from Moreley & Freere, and under him the Defendant claimed: And Judgment was given in Chester for the Plaintiff: And now Error was brought of this Judgment, and the Error assigned in point of Law, That Judgment was given for the Plaintiff, where it ought to have been given for the Defendant: And after several arguments at the Barr by Rolls, and Mason Recorder of London, for the Plaintiff in the Writ of Error, and Calthorp and Serjeant Hedley for the Defendant, It was now this Term argued by the Justices, seriatim, And all the Justices agreed, that the Judgment in Chester was well given, and should be affirmed. The first question moved, was, whether the Lease to Anne Seaton, was determined after the death of John Earl of Oxford, who made it, who was seized thereof in the right of his wife, and Tenant by the Courtesie, or only determinable by the entry of the Heir? For if it were only determinable, then no entry of the Heir being found, it was

was continued, and the reversion was in the Earl of Oxford, the Son, at the time of the Lease made to Hamlett Freer. But for this point upon the first argument, Richardson then living, agreed with the other Justices, that it was determined and void by the death of the said John, then Earl of Oxford, Tenant by the Courtesie, the wife being dead before, and then Anne Seaton was but Tenant at sufferance, and the Freehold in the Earl of Oxford, and no reversion, and for that point overruled it without further argument. For it is absolutely determined by the death of the Tenant by the Courtesie, and no acceptance of the Rent, or confirmation after by the Heir, can make it have continuance, Vid. 1 Ed. 6. Acceptance 19. Cok. lib. 2. fol, 77. The case of Harvie and Thom. cited Cok. lib. 8. fol. 34. in Payns case. Secondly, when the Lease to Rochester began? and as to that all the Justices resolved, That it began presently at the time of the sealing; because there was no such Lease in Esse to Anne Seaton at the time of the Lease to Rochester, but determined three years before, by the death of the said Earl of Oxford, and there was no such Lease made to Anne Seaton, but had other beginning and other ending, than is recited; and therefore it began presently, Vid. 3 Ed. 6. Br. Leases 62. Cok. 6. fol. 36. a. in the Bishop of Baths case, Plow. Throgmortons case, Cok. Lit. 46. b. Cok. 4. fol. 74. a. Dy. 116. Thirdly, The Lease to Rochester being raised in a material part, after the sealing and delivery thereof, whether that rasure be a cause to make the Lease void, or if the Lease be good notwithstanding this rasure? And Jones and Berkeley held, That the deed is voided by the rasure, but the Lease is good and remains in esse notwithstanding this rasure: And as to that, took a difference, when an Estate loseth his essence by a deed, viz. where it may not have an essence without a deed, as a Lease by a Corporation, or of Tythes, or grant of a Rent charge, or such like, if the deed be rased after delivery, it determins the Estate and makes it void. But when the Estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger, that shall not destroy the Estate although it destroys the deed, wherefore rasure here doth not make the Lease void and determine it. But I argued to the contrary, in this point, That for as much as it is a Lease by the deed, it is a contract by the deed, and the party himself who hath the interest by the deed, rasing that deed, he determins the deed, and his interest by his voluntary act, as if he had surrendred; and the contract being by deed, he may not determine the deed and the covenants, but quoad himself he doth destroy it, but peradventure quoad the Lessor it may have essence, if the Lessor will: But this is at his election, and not at the election of the Lessee. See for this point, Cok. 11. fol. 27. Dy. 261. Co. 10. fol. 97. in Doctor Leyfeilds case 7 Ed. 3. 57. 14. H. 8. 27. per Brook 44 Ed. 3. 42, Fourthly, Whether the Lease to Hamlet Freer be good or void? And that rests upon consideration, whether the Lease of the Land by the name of a Reversion, where he

1 Rol. 830.

R. 102. 212. 368. 436. 7. 1 Rol. 849.

1 Vent. 84.

Hob. 129. Post. 502.

he hath the Land in poſſeſſion and hath no reverſion (as it is if Seatons Leaſe be determined in facto, and Rocheſters Leaſe be void by the raſure, or that he be not in poſſeſſion by virtue of the Leaſe (becauſe it is not found, that Rocheſter entred by virtue of the Leaſe, and ſo cannot be an eſtate turned into a Reverſion) be a good Leaſe? And for this point all the Juſtices agreed, That it is meerly a void Leaſe; for the grant in the premiſſes is only of a reverſion, and it was the intent of the parties to paſs the reverſion only expectant upon the former Leaſes. And when there is not any Reverſion, it cannot paſs the Land in poſſeſſion; For by the name of a Reverſion Lands in poſſion cannot paſs; but by the name of Land, a Reverſion may well paſs. for he who will grant Lands in poſſeſſion, will rather grant them in Reverſion: But not ſo è converſo. And although the Habendum is to have and to hold the Land, That ſhall not paſs the Land in poſſeſſion, for it is intended he ſhould have the Lands ſo retourning. And Deeds are to be conſtrued, that they ſhall paſs things according to the intent of the parties, and the ſtrongeſt againſt the Grantor according to the apparent intent, and here the grant and demiſe is only of a Reverſion, and the Habendum ſhall inlarge it contrary to the Grant; ſo this Leaſe to Hamlett Freer is meerly void; and if it be not void, it is determined in time, for it began from the date, and then it is determined by effluxion of time: See expreſs authorities, that by the Grant of a Reverſion, if he hath not a Reverſion, nothing paſſeth, Co. Lit. 46. 324. b. Co. lib. 10. fol. a. b. in Lofeilds caſe, this point is recited to be ſo reſolved. Co. lib. 5. fol. 124. b. Saffyns caſe, Plow. 196, 423, 433, and 146. in Throgmortons caſe. And where it was ſaid, That the words and other the premiſſes would carry it, it was anſwered, that cannot be; For other is always another thing then that before mentioned; and the Reverſion of the Manor of Blacon is expreſly mentioned; So other cannot be extended to it, Vid. Co. lib. 1 fol. 177. a. 35 H. 8. Grants Br. 150. The fifth queſtion was, whether Morleys Leaſe were in eſſe at the time of this Leaſe made by the Plaintiff, and it was reſolved, that it was not, for that mis-recites the former Leaſes, and ſo hath the ſame Rule as the former, where it recites Leaſes and there be not ſuch; Therefore it ſhall begin from the date, which being in an. 15 Eliz. for fifty years, ended 1623. Wherefore for all theſe reaſons, the Judgment was affirmed.

Ant 180.

Ant. 155.

R. 212.

Co. Litt. 45. b.

Sir John Stonehouſe and Elizabeth his Wife *verſus* Sir John Corbet.

9. Jones 354. 2 Rol. 831.

ERror of a Judgment in the Common Bench in Waſte. Divers Errors were aſſigned concerning the waſte, and the proceedings therein, all which being overruled, one main Error was aſſigned ore tenus per Serjeant Henden at the Barre, For that in the Action of waſte he declares, that Sir Rich. Corbet was ſeized in Fee, and in Paſc. 8. Jac. levyed a fine of that Land to the uſe of himſelf for life; and after to the uſe of Eliz. his wife, for her life; and after

to

to the uſe of himſelf and the Heirs males of his body, and after to the uſe of Sir John Corbet Plaintiff, and the Heirs males of his body, and to the uſe of the Heirs of Sir Rich. Corbet: And that afterwards in Hill. 8 Jac. the ſaid Sir Rich. Corbet levyed another fine of the ſame Land, to the uſe of himſelf for life, and after to the uſe of Sir John Corbet & the Heirs males of his body, and after to the uſe of the right Heirs of the ſaid Sir Rich. That afterwards Sir Rich. died, and that his wife entred, and was ſeiſed for term of her life, the Reverſion to the Plaintiff, and that afterward ſhe married Sir John Stonehouſe, and committed waſte ad exhæreditationem of the Plaintiff. The Error aſſigned and inſiſted upon, was, That the Plaintiff hath not ſufficiently entituled himſelf unto the Reverſion, to puniſh the Waſte; Becauſe he doth not alledge, that Sir Rich. Corbet was dead without Iſſue male; and if he be not dead without Iſſue male, the Plaintiff cannot puniſh this Waſte: And although the Defendant by pleading to the Waſte, hath admitted it to be to this diſinheritance, yet intendment ſhall not help it, being matter of ſubſtance. But it was thereto anſwered, that for as much as 'tis ſaid, She entred and was ſeized for life, the remainder to the Plaintiff, it is intended that Sir Rich. is dead without iſſue. Alſo he alledging it to be done to his diſinheritance; that cannot be if the other had any iſſue alive. And the Verdict hath found it to be to his diſinheriſon, by which it is to be intended, that Rich. died without iſſue; wherefore Berkeley and my ſelf held it to be no Error. But Jones doubted thereof. Afterward upon another motion, it was adjudged, That the firſt Judgment ſhould be affirmed, Vide 5 Ed. 3. 37. 7 Ed. 3. 46. 13 & 14 Eliz. Dy. 304. Co. lib. 10. 63. Nuper, &c. Ant. 381.

Bowton *verſus* Nicholls.

ERror of a Judgment given in the Common Bench: Where Judgment was given for the Defendant, and that Judgment here affirmed, and 10 l. coſts given here to the Defendant upon the Statute of 3 H. 7. And it was now moved by Grimſton, that coſts were not grantable; For the Statute is, where Judgment is given againſt the Defendant or Tenant, and he, to delay the execution, brings a Writ of Error, and the Judgment is affirm'd that he ſhall have coſts for delaying his execution. But here the Judgment is given for the Defendant in the Common Bench; ſo no execution was to be awarded there againſt him: But the Plaintiff was barred, and although the Plaintiff brought the Writ of Error, and the Judgment is here affirmed, yet it is out of the Statute. And of this opinion was all the Court, upon conſideration of the Statute; Wherefore a Superſedeas was awarded to ſtay execution for the coſts. 10. Ant. 363. Ante 145. 175. 3 Cr. 617. 2 Cr. 636.

Termino Paſchæ, anno decimo *Caroli* Regis, in Banco Regis.

Memorandum, That the firſt Saturday of this Term, being 18. *April* 1635. Sir *John Brampſton* Knight, of the *Middle Temple* (one of the Kings Serjeants) was made Chief Juſtice of the Kings Bench. And firſt the Lord Keeper made a grave and long ſpeech, ſignifying the Kings pleaſure for his Choyce, and the duties of his Place: To which, after he had anſwered at the Barr, returning his thanks to the King, and promiſing his endeavour of due performance of his Duty in his Place he came from the Barr into Court, & there kneeling took the Oaths of Supremacy & allegiance, according to the Statute 3 *Jacobi*: Then ſtanding he took the Oath of Judge, which is the ſame Oath that all other Judges take: Then he was appointed to come up to the Bench, and then his Patent (which was only a Writ to attend the Office) being read by *Broome* Secondary, the Lord Keeper delivered it unto him. But *Jones* ſaid, That the Patent ought to have been read before he came up to the Bench. 1. Ante 225. R. 125. R. 125.

Anonymus.

A Prohibition was prayed by Grimſton to the Spiritual Court, for ſuing for Tythes of Lambs, ſurmiſing the Cuſtome to be, That if one hath Lambs under the number of ſeven, he ought to pay an half-penny for every Lamb under that number, in lieu of all Tythes of Lambs, and if he had but ſeven, the Parſon ſhould have the ſeventh Lamb, and ſhould pay 3 d. and if he had eight he ſhould pay 2 d. and if he had ten the Parſon ſhould have the tenth without paying any thing. Berkeley and Jones held, that the Canon Law is ſo, and ſo received in the ſpiritual Court, & it is ſurmiſed, that the ſpiritual Court allows of it; and therefore there needs not any Prohibition. But becauſe it was alledged, that it was a cuſtome, and the Parſon would ſtay untill the tenth, and would refuſe to accept according to the Cuſtome: And that in the ſpiritual Court, this ſurmiſe is not allowed; Therefore Brampſton Chief Juſtice and my ſelf conceived, That a Prohibition is grantable for that cauſe, and Jones and Berkeley agreed, that it would be granted, and the party might demurr if he would: Alſo for Tythes of Aftermowth, that there is a cuſtome in conſideration, that he ſhould make the firſt Ton- 2. 1 Ro. 648. 9. 651. 2 Cr. 42. 3 Cr. 660. 1 Rol. 648.

sure in good and sufficient Hay, and set it out in Cocks sufficiently dryed and ready to carry, that he should be discharged from the payment of Tythes of the Aftermowths: And that was held a good suggestion, by reason of the costs he bestowed in making it to be perfect Hay: And upon a surmise made, that he was sued for Tythes of Bees, that in consideration he paid Hony and Wax, and was at the charge for Hives and maintenance of them in Winter, he should be discharged of the Tythes of the Bees themselves: And upon these surmises a Prohibition was granted, being one of the first cases moved after Brampton was made chief Justice.

Hawkings *versus* Billhead. 10 Car. rot. 1312.

3. ACtion for words. Whereas the Plaintiff was of good name and fame, and of a chaste conversation, and divers had offered to marry unto him their daughters: And whereas he was in communication with one William Russell to marry his daughter, and the said William Russell was willing to have his daughter to match with him, and offered forty pounds in Marriage: That the Defendant, having communication with one J. S. and others, of the Plaintiff, The Defendant, the 20. of September, septimo Caroli, to discredit the Plaintiff and hinder him of his Marriage, said of the Plaintiff, That the Plaintiff had layn with such a Woman and others; and them *carnaliter cognovit*, by reason whereof the said William Russell utterly refused to give his daughter to match with him; and that he caused the Plaintiff to be prosecuted in the Archdeacons Court for that incontinency; and thereupon he brought his Action in this Court, Mich. 10 Car. The Defendant pleaded Not guilty and found against him. And now Maynard moved in arrest of Judgment, That these words being spoken 20 Sept. 7 Caroli, and the Action being brought Mich. 10 Car. (whereas it ought to be brought within two years by the Statute of 21 Jac. of Limitations) by his own shewing, it is brought for words spoken above two years; and therefore he is to be barred of this action. But because he had admitted the Action, and had not pleaded the Statute of Limitations, but Not guilty; Jones and Berkeley Justices held, That he shall not now have advantage thereof: And Jones said, that he knew it had been so ruled twice in the time of the Lord Lea chief Justice, and in the time of Sr. Randall Crew chief Justice; For otherwise there should be a mischief in this Court more than in another Court, (viz.) in the Common Bench, where they prosecute by original and outlawry; and if the outlawry be reversed, the Statute aids the Plaintiff. But here they proceed by Latitat, whereby the cause of the Action doth not appear, and may peradventure divers years continue by Process, before the Defendant may be arrested; And the Plaintiff in his Declaration needs not shew the cause wherefore he did not commence his Suit sooner; for if he should do so, the Declaration would be more prolix than was convenient.

Ante 381.

venient. But if the Defendant pleads the Statute of 21 Jac. then the Plaintiff by the Replication ought to shew good cause, why he did not bring his Action within the time limited by the Statute; otherwise he is to be barred: For the Statute allows of many impediments, viz. Infancy, Imprisonment, *ouster le meer*, and others therein mentioned, which shall be sufficient causes, that the Action was not brought sooner. But I doubted thereof, because by his own shewing, it appears that the Action is not brought within the time limited by the Statute: And the Statute is in the negative, That it shall not be brought but within the time; so the Court, ex officio, ought to abate it, unless he had shewn wherefore it was not brought within the time. But by the opinion of the other Justices, it was adjudged for the Plaintiff, unless other cause, &c.

The Case of Baker *versus* Hicking. Quod vide ante pag. 387.

WAs now this Term argued at the Barr, and after at the Bench. And Brampston, Jones, and Berkeley argued, That the Devise was void: For they all held, that the Lease for life is only the Lease of the Tenant in Tail, during his life and the life of the Lessee; and then it is a discontinuance, and the Reversion taken from him in reversion is displaced: And then he having nothing in the Reversion but only a Right, cannot make a Devise: For the Lease being a Lease for life, rendring a Pepper corn, is not warranted by the Statute of 32 H. 8. And then being a Lease for life of the Lessee, the livery is only made by the Tenant in Tayl; for he hath the sole power of the immediate Freehold & the immediate possession and Inheritance; Then when they make a Lease for life, it is an immediate wrong to the intaile, and discontinues the Estate tail during the life of the Lessee; And the Tenant in Tail hath gained a new fee, and is seized of a Reversion in fee expectant upon the Estate for life during the Lease, and it is a new Reversion in the Plaintiff: And for that, they relyed upon 11 H. 7. and 13 H. 7. If there be Tenant in tail, remainder to his right Heirs, he may be restrained by a condition not to alien; for his Feoffment is there held a discontinuance: And Jones cited a Case adjudged betwixt the Lord Cromwell and Andrews, 15 Eliz. Tenant in Tail, Remainder to his right Heirs, makes a Feoffment by Deed, and delivers the Deed to the Feoffee, and after livery is made by an Attorney. The question was, whether the Remainder passed by the delivery of the Deed? For then livery to him in Remainder had not been a discontinuance: But it was resolved, that it was a discontinuance: And there is no difference when Tenant in tail, Remainder to his right Heirs, makes a feoffment; And when he in Reversion and Tenant in tail joyn in a Lease for life, which is a discontinuance; And it is a discontinuance presently, or it cannot be a discontinuance by the death of the Tenant in tail having issue; for, as Brampston said, the change of the Reversion is presently by the

4.
2 Rol. 59. 121
1 Rol. 633.
Co. Litt. 224. a
Ro. 633.

the livery or not at all, and it is not changed by the death of the Tenant in tail having iſſue, and that being a Leaſe for the life of the Leſſee, cannot be conſtrued to be a Leaſe for the life of the Tenant in tail (as it ſhall be conſtrued if it be not a diſcontinuance) and after his death without iſſue, a Leaſe for life againſt him in reverſion; Wherefore they all concluded, That it was a diſcontinuance and Judgment ought to be given for the Defendant. But I argued to the contrary, that it is not any diſcontinuance, nor the reverſion diſplaced; Firſt, Becauſe it ſhall not be taken to be a tortious Leaſe and a diſcontinuance, when by any means it may be conſtrued a good and rightfull Leaſe, and it may be here ſo conſtrued, when tenant in tail and he in reverſion joyn; For it is an Eſtate derived out of both their Eſtates, viz. a Leaſe of the Tenant in tail as long as he lives, and afterward of him in reverſion, as Cok. Lit. 45. a. and Cok. lib. 6. fol. 14. 15. a. Treports caſe is reſolved. Secondly, it is no diſcontinuance, becauſe they joyn in the Leaſe, for he in reverſion joyns in the Act of making of this Leaſe, and ſo it is not the intention of any of the parties to diſinherit him in reverſion, and to take away or diſplace the reverſion. Wherefore the Law ſhall not make any ſuch conſtruction, eſpecially here, when tenant in tayl is dead without iſſue, there is not any iſſue againſt whom there ſhould be a diſcontinuance; and it is not a diſcontinuance unto the reverſion, becauſe he joyned. To prove this was vouched 27 H. 8. 13. Co. lib. 1. fol. 76. a. Bredons caſe: And an Act may be a diſcontinuance now, and not a diſcontinuance by matter ex poſt: As if tenant in tayl infeoffe him in reverſion, and a ſtranger, and he in reverſion ſurvive, it is no diſcontinuance: So if *Baron* and *Feme* make a Leaſe for life, by Deed of Lands of the *Feme*, if the *Feme*, after the death of the husband, agrees, it is no diſcontinuance; but if ſhe diſagrees, it is a diſcontinuance. So here, if tenant in tayl had died having iſſue, it might have been a diſcontinuance againſt the iſſue. But if otherwiſe, it is againſt the intent of the parties, to conſtrue it to be a diſcontinuance, when Tenant in Tayl hath no iſſue. But all the other Juſtices held it to be a tortious Act in it ſelf, And that although he hath not afterward any iſſue, it is not material. Wherefore it was adjudged for the Defendant. *Co. Lit. 335. a.*

Lit. Sect. 625.

Co. Lit. 333. a.

Mayo *verſus* Cogſhill.

5. 1 Ro. 221.

ERror of a Judgment in Ejectione firmæ againſt *Baron* and *Feme*. The Defendants pleaded Not guilty, and the *Feme* was found guilty, and the *Baron* found Not guilty; and Judgment againſt the *Baron* and *Feme* quod Capiantur, and for this cauſe the Error was aſſigned; becauſe the Judgment ought to have been againſt the *Feme* quod Capiatur, and not againſt the *Feme*, where he is acquitted; For he ought not to be impriſoned for his wives offence

fence: But Rolls for the Defendant in the Writ of Error moved, That it is not any Error; and that the Judgment in this case ought to be against them both quod capiantur: For it is only for the fine to the King; and the imprisonment is no longer, but until the fine be paid; And the *Baron* ought to pay it, for the *Feme* cannot. And to prove this, he cited a President in this Court, Trin. 4 Jac. rot. 376. betwixt Lewes and White, where, in a Writ of Error upon a Judgment in the Common Bench in Trespass against *Baron* and *Feme*, they pleaded Not guilty, and the *Baron* was acquitted and the *Feme* only found guilty: and the Judgment was against them both, Quod capiantur. And it was assigned for Error for this cause, and the Judgment affirmed. And Broom the Secondary said, That so are all the Presidents of this Court; wherefore the Court here awarded accordingly, that notwithstanding this Error, the Judgment should be affirmed. But then another Error was assigned, That in the Declaration there was not vi & armis. And upon view of the Record it appeared, that it was in the Writ vi & armis intravit, &c. But in the Count it was omitted; wherefore for this cause the Judgment was reversed.

2 Cr. 203.

Moor 704. 3 Cr. 381. Post. 513.

1 Rol. 221.

Termino

Termino Trinitatis, anno undecimo *Caroli* Regis, in Banco Regis.

Bushell, Hurstwayt, and Brand *versus* Yaller. Trin. 10 Car. rot. 456.

1. ERror of a Judgment in the Common Bench by Bushell the Defendant, and Hurstwayt and Brand the Bayl, in the Common Bench, against Yaller. It was assigned for Error by Grimston, That no Capias was awarded against the principal; and yet a Scire facias issued against the Bayl, and Judgment against them. And now it was moved, That this Writ of Error brought by the Bayl and the Principal, was not good; for they ought not joyn in a Writ of Error; for the Bayl may not avoid the Judgment against the Principal by any Error which is in the proceeding; and the Principal hath nothing to do with the Judgment against the Bayl. And of that opinion were all the Justices, besides Berkeley, who doubted thereof; because by the Judgment against the Principal, the Bayl is damnified; wherefore he conceived, they should joyn in the Error to avoid the principal Judgment. But he agreed, that the Principal ought not to joyn in a Writ of Error, to reverse the Judgment against the Bayl: And afterward he consented with the other Justices, That a Writ of Error lies not in this manner; wherefore it was abated.

2 Cr. 384. Ante 300 Post. 575. Hob. 72.

Townsend *versus* Hunt. Hill. 11 Car. rot. 774.

2. ASsumpsit. The Plaintiff declares, That whereas Francis Townsend made his Will, & thereby devised to the Plaintiff three score pounds, to be paid at his age of one and twenty years; and made Anne his wife his Executrix, and left assets to pay his debts and Legacies: And that the said Anne took the Defendant to husband, and afterwards the Plaintiff came to full age; and the Defendant and his wife paid to the Plaintiff, in part of payment of the said Legacy, upon the 23. of April, three and fifty pound, who gave to the Defendant and his wife a general release. That the Defendant, 28. Septemb. 5 Car. in consideration that the Plaintiff, at the Defendants request, had made a general release to the Defendant and his wife, assumed to the Plaintiff, that if his wife did not pay the seven pounds residue of the said Legacy in her life time, that he would pay it after his (the said Defendants) wife's death: And alledges in facto, That the Defendants wife did not pay the said seven pounds in her life; and that he had required it of the Defendant,

Jones 365. 1 Ro. 13.

Defendant, and he had not paid it, per quod Actio accrevit. And upon this Declaration the Defendant demurred. And it was argued at the Barre by Farrer for the Plaintiff, and by Calthorp for the Defendant. And he shewed for cause of his demurrer, That this promise being for a consideration past, is a void promise, and here is not a continuing consideration, but nudum pactum unde non oritur Actio. And compared it to the Case in 10 Eliz. Dyer 272. a. Where one promised to one who was Bayl for his servant, to save him harmless, It was adjudged a void promise, and for this reason Berkeley Justice was of that opinion. But if it had been a consideration continuing, As in consideration of marrying his Daughter or Cousin, which is as a gift in Frank-marriage, it had been good. But not here, no more than if in consideration you gave him an horse a year since he had promised to pay you ten pounds, which is void, because past, But Justice Jones and my self upon the first motion conceived it good: for if this promise had been made at the time of the release made, it had been clearly a good promise and a good consideration; then being made after the release, for as much as the release is made at the Defendants request, and the Defendant hath the continuance of the benefit thereof, the promise upon this consideration is good enough: For so the Case imports in decimo Elizabethæ, Dyer 272. if the Bayl had been entred into at the Masters request, and afterwards he had made the promise, it had been well enough. And for this purpose they vouched a Case, which was Pasch. vicesimo quarto Elizabethæ, betwixt Marsh and Raynsford; And another case here betwixt Rigges and Bullingham, where, in consideration that the Plaintiff, at the Defendants request, had granted the next avoidance of such a Church, the Defendant, at a day after, promised to pay to the Plaintiff one hundred pounds. After Verdict, upon non Assumpsit, it was moved in arrest of Judgment, First, Because there was no time or place mentioned, when that Grant was made. Sed non allocatur, Because it was but an inducement to the Action. A second exception, because it was a consideration past; and it might be twenty years before. Sed non allocatur, Because it was made at the Defendants request. And afterwards, in Mich. 11 Car. the principal Case being moved again, all the Justices, seriatim, delivered their opinions, that 'twas good; and it was adjudged for the Plaintiff.

Pl. Com. 303. a
3 Cr. 194. Dier. 272. b.
Ante 223. Moor. 866. 2 Cr. 18. Hob. 10. 3 Cr. 715.
3 Cr. 59. 3 Cr. 715. 1 Rol. 13.

The King *versus* Sir Basil Brook.

SCire facias. Quare non satisfecit a fine assessed upon him at the Justice Seat in the Forest of Deane. The Plea was, That the Justice Seat was at Glocester, which is out of the Forest. And thereupon it was demurred because the beginning of the Justice Seat was within the Forest, though after adjourned to Glocester. And all the Court held it good enough, that the Justice Seat being

3. 1 Rol. 533. 4.

begun at a place within the Forest, it may be adjourned to a place out of the Forest, &c. wherefore it was adjudged for the King.

The King *versus* Mynn.

4. SCire facias. Where such Judgment was given against him, he being found a Trespasser, for cutting trees within the Forest without licence: And the proceeding against him being removed by Cerciorari out of the Chancery; and by Mittimus sent in Banc. Regis: he pleading such Plea, and demurrer thereupon, it was adjudged for the King.

Smith *versus* Smith

5. Post. 421. Co. 8. 62. b. Co. Lit. 127. a. 2 Cr. 628. Post. 574. ERror of a Judgment in Dower. The Record certified the Defendant in misericordia, and the Error intended to be assigned, was, Because the Defendant being an Infant, and appearing by Gardian, ought not to be amerced. The Defendant moved in the Common Bench to have it amended; And it was amended and made Nihil in misericordia quia Infans: And upon a Writ of Cerciorari this amendment was so certified. And it was moved by Grimston, that it should be amended in this Court, and the Judgment should be affirmed. And I doubted if such amendment might be upon diminution alledged in the Record against the Record certified in point of the Judgment. But because it being now certified, that the Record at the first was miscertified, the Court here would not intend, that it was amended after the Judgment entred, but that the Record in the Court there (in the Judgment) was well entred at the first, and not misentred. And that being in Case of Dower, and after Verdict, which were to be favoured, the Court agreed, That such Cerciorari to aide the Judgment was well awarded. And the Record was amended accordingly, and the Judgment affirmed.

William Reve *versus* Malster and Barrow. Hill. 9 Car. rot.

6. Jones 361. 1 Rol. 624. TRespass, for entring into certain Lands called Hoo-green. Upon Not guilty, and special Verdict, whereby it appeared, That George Reve, Copyholder in Fee of the Land in question, being parcel of the Manor of Hoo, (where the Custome is, that the Land is of the nature of Burrough English, descendable to the youngest Son) had issue three Sons, William the Plaintiff, George and Charles, and surrendred that Copyhold to the use of himself and Anne his wife, and his heirs; and they were admitted accordingly. And afterward George the father died seized of this Reversion, which descended, secundo Jacobi, to the said Charles his youngest

R. 6.

youngeſt Son. Anne enters and enjoys it. And after, in 12 Jac. Charles dyed without Iſſue. Afterward Anne in 6 Car. died: William Reve, the eldeſt Son, was admitted and entred; George Reve, the ſecond Son, enters and claims that land, and ſurrenders to the uſe of the Defendant Maſſier, who was admitted; upon whom William the Plaintiff entred: And he, and the other Defendant as his ſervant, re-entred; whereupon this Action was brought. Et ſi ſuper totam, &c. And this matter was argued at the Barr, and after at the Bench. And it was argued at the Bench by Jones Juſtice, and by my ſelf for the Plaintiff; and Juſtice Berkeley, and Brampſton chief Juſtice, for the Defendant. The R. 3. ſole queſtion was, whether William Reve, Son and heir of George Reve, who created this Reverſion, and brother and heir of Charles (who had this Reverſion as youngeſt Son and heir in Borough Engliſh) or George the middle Son ſhall have this Reverſion? Firſt, It was agreed by them all, that George cannot have it, as brother and heir of Charles, by the cuſtome; becauſe the cuſtome is only to extend to the youngeſt Son, and not amongſt brothers, where no ſuch cuſtom is found: And without a ſpecial Cuſtom found, that Co. Lit. no. b. it ſhall deſcend to the youngeſt brother, the Law will not admit it; becauſe Cuſtoms ought alwaies to be taken ſtrictly: And ſo it was reſolved in Ballards Caſe, for a Copyhold in Totenham. Secondly, It was agreed by them all, that although Charles never was admitted, but died before admittance, it is not material; for it is all one as if he had been admitted; For he was a Copyholder, and might have ſurrendred, or charged, or let, &c. Thirdly, they all agreed, that betwixt a Copyhold in Borough Engliſh and a Freehold in Borough Engliſh, there is not any difference. And that if Anne the mother had died in the life of Charles, and Charles, ſurviving, had entred and died without iſſue, then William ſhould have had the Land, as heir of Charles. But the great queſtion was, this being a Reverſion expectant upon an Eſtate for life, and Charles never being ſeized of the Lands in poſſeſſion, but dying in the life of the Tenant for life, without iſſue, whether George as youngeſt Son, may claim it, or that William, as heir at the Common-Law, ſhall have it? And Brampſton chief Juſtice, and Berkeley argued ſtrongly, that George, the middle brother, ſhould have it, and by conſequence the Defendant, who claimed under him, as if Charles had never been born or in eſſe: For there being a Reverſion expectant upon an Eſtate for life, and the Tenant having the poſſeſſion, George ſhall make his title from his father, and take by deſcent from him who had the ſeiſin of the Freehold, and not make any mention of him who had but the Reverſion expectant upon an Eſtate for life: And compared it to the Caſe of a Brother of the half-blood, although the Co. 8. eldeſt Son ſurvive the Father, yet he may claim it by deſcent from his Father, when the eldeſt had not poſſeſſion and died without Iſſue, as 40 Ed. 3. 9. and 7 H. 5. 2. And if the Father died in

poſſeſſion, and the eldeſt Son, ſurviving, died before entry, The ſecond Son, although he were of the half-blood, ſhall have it, he claiming by diſcent from him father; and never ſhall make mention of his brother, although in ſome reſpects he was a tenant, to alien and change. But in all Actions and writs where he conveys by diſcent, there ſhall not be any mention of any, but of thoſe who took the Eſtate and had ſeiſin, and not from others who never had ſeiſin, the Law eſteeming them as if there never had been any ſuch perſons: As in Fitzh. Recovery 212. & Co. lib. 8. fol. 88. b. Buckmers Caſe: And by conſequence he may claim here as youngeſt Son by the cuſtome, as heir in Borough English, as if Charles never had been, becauſe he hath it by diſcent, and in courſe of a diſcent. But againſt that Jones and my ſelf held, that William the eldeſt brother had the better title, and we agreed to all the caſes put of Diſcents, or conveyed by diſcent at the Common Law. But in this caſe the youngeſt Son hath it by cuſtome; for he being youngeſt Son at the time of the death of his father, that makes him heir in Borough English by the Cuſtome. And for this cauſe none can be ſaid to be heir in Borough English to his father, ſo long as his father lives. See Coke lib. 6. fol. 22. a. Gorges Caſe. And when the youngeſt Son is heir, in whom it veſts by the Cuſtome, It is an Inheritance fixed in him: And the cuſtome hath his operation in him; and none may claim that after, but he who is heir unto him: And therefore we held, that the youngeſt Son, who is in eſſe at the time of the death of his father, only ſhall have it by the cuſtome. And if a man hath iſſue two Sons, and being ſeized of Land in Borough English, dies ſeiſed of that Land, his wife *priviment enſeint* of a Son, the Son in eſſe ſhall have it by the cuſtome, and the Son born after ſhall not devеſt him, Becauſe he was not youngeſt Son at the time of the death of his father. Vid. 5 Edw. 4. 6. 9. H. 7. 15. 30. Aſſ. 47. If Land veſts in an heir by reaſon of a contingencie; although another heir more near comes after in eſſe, it ſhall never be devеſted; and he who will after claim, ought to claim from him in whom the Eſtate veſted. So here, this Reverſion veſting in the youngeſt Son by the cuſtome, is quaſi by a contingencie, and he is named heir per accidens, as in Ratcliffs Caſe, Coke lib. 3. fol. 38. a. and he is quaſi a purchaſor of that Reverſion; wherefore when he dies without iſſue, it ſhall deſcend to him who is his heir, which is the eldeſt Son: And he is his heir to his youngeſt brother, and alſo heir to his father, who was laſt ſeized of the Reverſion; and there is no reaſon but he ſhould have it as Heir to his brother and to his father. And this Caſe is not like to the Caſes put, where they claim meerly by the Common Law. And whereas it was held by Brampſtone and Berkeley, that George the youngeſt Son ſhould have it as heir in Borough English, becauſe he is the youngeſt Son when the *Feme* died, and the reverſion fell in poſſeſſion, that was utterly denyed by Jones and my ſelf: For he was not youngeſt Son when his father died; And none may have it by

1 Rol. 624.

that

that Cuſtome, but he who is youngeſt Son at the time of the death of the father: For as it is ſaid, that ſuch an one eſt primogenitus ejus filius, and heir at the Common Law; So in Borough English, That ſuch a one eſt minime natus at the time of the death of his father, and heir unto him according to that Cuſtome: And he who is the middle Son at the time of the death of his father, cannot be ſaid to be the youngeſt Son at that time, and therefore not within the Cuſtome: Wherefore, &c.

Anonymus.

ERror of a Judgment in Coventry: The Error aſſigned and inſiſted upon by Maynard, was, That the Verdict found 5 l. for damages, and 26 s. 8 d. for coſts. And the Court awarded, that he ſhould recover the damages and coſts, aſſeſt by the Jury; and further, that he ſhould recover 53 s. 4 d. de incremento ad requiſitionem *le* Plaintiff, and he doth not ſay, pro miſis ſuis, according to the uſual courſe of the preſidents, and it might be the incrementum was pro damnis. And all the Court (beſides Berkeley) held, that it was well enough; For it ſhall be intended pro miſis, which was the laſt antecedent, and that which might lawfully be increaſed, and not pro damnis which cannot be increaſed; wherefore the Judgment was affirmed. 7.

Termino

Termino Michaelis, anno undecimo *Caroli* Regis, in Banco Regis

King *versus* Fitch. Trin. 9 Car. rot. 213.

1. Rol. 569. 70. Rol. 673. ERror of a Judgment in Waſte, in the Common Bench: where Judgment was, upon default of the Defendant, that a Writ of Inquiry of waſte ſhould be awarded. The firſt Error aſſigned by Maynard, was, becauſe the waſte being aſſigned in three Houſes, two Gardens, &c. upon the writ of Inquiry, waſte was found in the Houſes and Gardens, and intire damage given. And it was alledged, that ſeveral damages ought to be given for F.N.Br. 60. every of them, ſo that it might appear to the Court, what damages were in every of them; For if it were ſmall in any of them, viz. under 12 d. it is ſo little that the Court would not adjudge it waſte; and being aſſigned in ſeveral Houſes, it ought to appear to the Court 1 Rol. 570. how much is the waſte of every of them, by it ſelf particularly, Vide 9 H. 6. 67. Sed non allocatur; For when the Sheriff and Jury have had the view, and given damages for the waſte, it ſhall not be intended petit damages in any: And the uſual courſe is in all preſidents to find intire damages. The ſecond Error, Becauſe F.N.Br. 107. upon the Writ of Inquiry of waſte, thirteen Jurors were returned to be ſworn, where there ought to be but twelve; For it is not like to other writs of Inquiry, where it is uſual to have more than twelve, at the Sheriffs pleaſure, for that is but a meer Inqueſt 2 Rol. 673. of Office: But here it is a verdict, and in nature of a Verdict, whereof an Attaint lyes, Vide 3 H. 6. 29. Et adjournatur, poſtea 452.

Acton *verſus* Symon. Mich. 10 Car. rot. 83.

2. Jones 364. 1 Ro. 8. 9. ASſumpſit. That the Defendant, the twenty fifth of April anno 3 Car. in conſideration the Plaintiff would demiſe unto the Defendant, the moitie of an Houſe and certain Lands, for three years, for the rent of 25 l. per annum, payable at Mich. and the Annuntiation, aſſumed to pay the ſaid rent at the ſaid Feaſts. And alledges in facto, that poſtea the ſame day, he demiſed the ſaid Lands to the Defendant in forma prædicta, and that he enjoyed the Land accordingly during the three years, and had not paid

paid his rent. The Defendant pleads a surrender of the said Lands, before any of the Feasts, for which the breach was assigned, and acceptance thereof: And hereupon, they were at issue and found for the Plaintiff. And it was now moved by Grimston, in arrest of Judgment, that the Action lies not, because it is grounded upon a personal promise in a real contract, which real contract being executed, the Assumpsit, which is meerly personal, is determined; and the rent being real, he cannot bring this Action for the non-payment thereof. But Jones, Berkeley, and Brampston chief Justice conceived it lies; For it is a collateral and absolute promise: But if it had been an implyed promise (as upon a sale of Goods, &c.) This Action lies not. But there being an express and direct promise alledged, which is in a manner confessed by the Defendant, by his Plea in Barr, The Action lyes, as if he had covenanted by Deed, or were obliged by an obligation to pay the rent, and so this promise is good. But I doubted thereof, Because it is a personal contract. And by the Lease made, the personal contract is determined; For it is in vain to have an Assumpsit, where he may have Debt upon the Lease, and thereby recover the debt and damages for the forbearance: And in this action no *gager del ley* lyes, and then there is no cause to have this Action. And Germyn urged, That if this action were maintainable, then the Defendant could not plead eviction or suspention of the rent, by entry into part of the Land. But all the Court denied it; For notwithstanding this promise, it is a rent as before. And if it be determined as a rent, the promise for the rent is also discharged; whereupon by the said three Justices, it was adjudged for the Plaintiff. But we all agreed, That there ought to be an express promise proved, if he had pleaded non Assumpsit, and that an implyed promise would not have served. And Berkeley held, that if he recovered damages to the value of the rent arrear, it may be pleaded in Barr to an Action of Debt for the rent. But Brampston and I denyed it. And Berkeley said, if one borrow money, and promise to enter into bond to pay it at a day to come, and promise that he will keep his day of payment, and afterwards he makes an Obligation for the payment of this Money at the day, if he fayl of the payment, Debt may be brought against him, upon the Obligation, and he may also maintain an Action of the Case upon the promise. But I denyed it, Because the Obligation determines the Contract.

2 Cr. 598. 668
1 Rol. 89.

Ante 343.

Yelv. 84.
2 Cr. 110.
3 Cr. 240.
Ante 6.

Done *versus* Smethier and Leigh. Trin. 8 Car. rot. 1310

ERror to reverse a fine in Chester 2 Car. Betwixt Smethier and Leigh Demandants, and Sir Rich. Done, and Sir John Done and Margaret his wife, and John Done their Son and heir apparent, deforciants, &c. The Error assigned was, Because the writ of Covenant was directed to the Coroners, with this clause in the end

3. Jones 373. Jones 352. 1 Rol. 797.

end of the Writ, Quia prædictus *Joh. Done* Miles, est Vicecomes Comitatus *Cestriæ*, fiat executio Brevis prædict. per Coronator' ita quod Vicecomes non se intromittat, where the Writ ought to have been directed to the Sheriff, &c. And this was divers times argued at the Barre, and much insisted upon, by Calthorp, Maynard, and others, who argued at the Barr for the Plaintiff in the writ of Error. And first they said, That if the Sheriff had been the sole party to the fine, yet the Writ ought to have been directed unto him, because it is but a summons, and the Sheriff may summon himself. Also it is not returned, That he is Sheriff and cannot summon himself; and the course of Law is, that the Writ shall be directed unto the Sheriff, and not unto any other, when it may be done without prejudice. And that the Writ is abatable where it is directed to the Coroners, &c. Vid. 18. H. 8. 3. 9 H. 6. 12. The second reason, Because that the Sheriff is not the sole party, but others are joyned with him, &c. And all the Court resolved, That it was not Error; for if the Writ be directed to the Sheriff, and he is party, it is doubted in the Books, if the Sheriff, as Plaintiff, may execute a Writ for himself; and, as Defendant, may execute a Writ upon himself. And therefore it were good, to avoid that doubt, to take a Writ directed to the Coroners, as well where the Sheriff is Plaintiff, as Defendant, upon surmise thereof in Chancery, at the time of suing the writ. And it is the general course to award the writ to the Coroners, to avoid the doubt of delay; for if he be Plaintiff and makes not such surmise, the Defendant peradventure will take exceptions in abatement of the writ; And so if he be Defendant he may peradventure plead in abatement of the Writ, and cause him to have a new Writ. But when it is awarded to the Coroners, if the Defendant would have excepted against it (as peradventure he might in some cases) yet when he appears and accepts thereof, and comes and levies a Fine thereupon, he never afterwards shall assigne for Error, that the Writ ought not to have been directed to the Coroners, especially upon this amicable Writ to make assurance, &c. Vid. 34 H. 6. 29. 12 H. 4. 24. 8 H. 6. 28. 2 H. 6. 12. Fitzh. N. Br. 98. 11 Ed. 4. 7. 3 H. 6. 2. Another Error was assigned, That the writ of Covenant in the Certificate is, si fecerit eos secur. &c. where it ought to be vos. But upon view of the retourn of that writ certified from Chester, it was vos, whereupon it was awarded, That the Roll should be amended, and the Fine was affirmed.

1 Rol. 797. Pl. Com. 76. a.

Downs *versus* Hathwait.

4. DEbt upon a Bond de quinquaginta duabus libris: The Defendant pleads non est factum. The Jury find the bond to be quinginta duabus libris, with a condition to pay 26 l. and that the Defendant delivered that as his Deed to the Plaintiff: And if that be the

the Deed of the Defendant, as is mentioned in the Declaration, they pray the discretion, &c. And upon motion the Court held it to be found for the Plaintiff; for quinginta is all one with quinquaginta, as viginta pro viginta, whereupon Rule was given, That Judgment should be entred for the Plaintiff, unless, &c. And afterward being moved again, another exception taken, That the Bond and the Declaration were John Hathwait, and the Roll is Joaes. Sed non allocatur; but adjudged for the Plaintiff. Quod vide postea pag. 418. 2 Cr. 147.

Needler *versus* Symnell and his Wife. Trin. 11 Car. rot.

5.

ACtion upon the Case, for words. Whereas the Plaintiff was of good name and fame, and a Citizen and Freemen of London, and for twenty years had used, and yet useth the Trade of selling of ..... without any deceipt, That the Defendants wife said these words, Thou art a Cheater, and hast cheated my Husband of 500l. The Defendants pleaded, Quod ipsi non sunt inde culpabiles, and found for the Plaintiff, and damages forty pounds. And it was now moved in arrest of Judgment, first, That the Issue was not well joyned, for being for words of the wife, the Issue ought to have been Ipsa non est inde culpabilis. Sed non allocatur; For the *Baron* and *Feme* are charged as for the wrong of the *Feme*: So the issue, Quod ipsi non sunt inde culpabiles is well enough. Secondly, It was moved, That for these words an Action lies not; for the words do not touch him in his Profession, as a Tradesman, nor are applied unto him for cheating him in his Trade; but it may be that he cozened or cheated him at Dice, or by sale of Land: And to say, That one cozened or cheated him, an Action lies not, no more for a Tradesman than for any other person: And it hath been so resolved and adjudged in Sir William Brunkers Case, and Gorges Case. And of that opinion was all the Court, they delivering their opinions seriatim; wherefore Rule was given to enter Judgment for the Defendant, unless, &c. Jones 366. 1 Ro. 62, 68. 2 Cr. 6. Hob. 126. 2 Cr. 288, 239. Post. 594. 1 Rol. 62. 2 Cr. 339. Post. 516. Moor 261. 3 Cr. 95. Hutt. 14.

Doctor Sybthorps Case.

6.

ACtion for words. For that the Defendant, at Burton-Lazers Church, spake these words: See, Doctor *Sybthorp* is robbing the Church: And afterwards, at another day, spake of the Plaintiff, Doctor *Sybthorp* hath robbed the Church (innuendo the Church of Burton-Lazers.) After Verdict for the Plaintiff, Bagshaw moved in arrest of Judgment, That for the first words an Action lies not, Because he doth not charge him with an Act done, but in attempting to do an Act. And for the last words, That it lies not, Because it doth not mention what Church, nor of what thing; and it may be in taking away the Leads, or such things, which be not felony; or, as the common speech is, Jones 366. 1 Ro. 76.

for not paying his Tythes. Sed non allocatur; for all the Court held, That for both speeches an Action lies; for it is to be intended in the worser part; being spoken maliciously to slander him; and
2 Cr. 154. that it was for the taking of such things as is a felonious Act. And although it was objected, That robbing the Church is an intention to do an Act, and is not felony. And to say, That he attempting to do an Act, cannot be felony, and therefore no cause of Action; Berkeley said, That for saying such a person is robbing such a man, or ravishing such a woman an Action lies. So here: Wherefore
2 Cr. 153. it was adjudged for the Plaintiff. Vid. Pasch. 5 Jac. betwixt Benson and Morley adjudged, that for these words, Thou hast robbed the Church, innuendo the Church of Alphage, an Action lies.

The Case of Downs and Hathwait, Ante pag. 416.

7. Jones 366. 2 Rol. 136. 47. Ante 314. WAs moved again. Rolls for the Defendant, first, That there is a variance betwixt the Obligation and the Declaration; for the Declaration is, That Johannes Hathwait *fuit obliege*; and the Obligation is Joaem, without any dash or prick over it; So it cannot be the same Obligation whereof he declares, and the Bond is void for the insensibility; for Joaem is not any name. Sed non allocatur; For it is the same word, and shall be intended Johannem abbreviated. And an Obligation shall not be avoided by vicious writing or incongruity. Secondly, He moved, That
2 Cr. 147. quinginta is not a word of any certainty, and especially it cannot be taken for quinquaginta, for it wants the syllable (qua,) and if it hath any sense, it is rather to be taken for five hundred than for fifty.
Hob. 19. Ante 33. 386. Sed non allocatur; For it cannot be taken for five hundred, because it is not genta, which is taken for a hundred; and it hath sufficient intendment to be fifty, by the condition to pay six and twenty pounds.
1 Cr. 896. And a case was remembred, That an Obligation of septingent was taken for septuagint, and not seven hundred, nor void. So here: Wherefore it was adjudged for the Plaintiff.

Baker and Unica his Wife *versus* Brereman. Pasch. 11 Car. rot. 152.

8. Jones 367. ACtion upon the Case. Whereas the wife, before marriage, was possest of a Lease for years, of a Close in St. Martins, in which Close a Stable was formerly erected, and now an house there builded; and that the Defendant was occupier of another Close called the Yard, in the said Parish of St. Martins, near adjoying to the Plaintiffs Close: And that within the said Parish there is, and time whereof, &c. was a custom, Quod omnes occupatores of such a Close of the Plaintiffs à tempore cujus contra, &c. habuerunt & habere consueverunt, for them and their servants, quandam viam tam pedestrem quã equestrẽ at all times of the year for all Carts and Carriages from the said Close of the Plaintiffs

in

in vel ultra the Cloſſe called the Yard, ad vel in a place uſually called the Leyſtall in St. Martins aforeſaid, & ſic retrorſum from the ſaid place called the Leyſtall & in ultra the ſaid Cloſſe called the Yard, uſque ad the Cloſſe of the Plaintiff. And the ſaid Unica his wife ſo being poſſeſt, and having the occupation of the ſaid Cloſſe, That the Defendant, to hinder her of her way, and totally to exclude her, ſuch a day and year, erected a building upon the Cloſſe called the Yard ex tranſverſo viæ prædictæ, that ſhe might not have nor uſe the ſaid way: And that afterward ſhe married the Plaintiff Baker; and that they, after the mariage, could not uſe the ſaid way, to their damage of forty pounds. The Defendant pleads Not guilty, and found againſt him. And now it was moved in arreſt of Judgment by Hutchings, firſt, That ſuch a cuſtome within a Pariſh alledged for an occupier of ſuch a Cloſſe, to have a way, &c. is not good; but he ought to preſcribe in him who hath the Inheritance: And that a cuſtom in a Pariſh cannot be well applied to a Cloſſe in the Pariſh, 21 Eliz. Dy. 363. Cok. Lib. 6. fol. 60. b. And of that opinion was all the Court. And although Rolls alledged, That he cannot otherwiſe preſcribe, becauſe one man was once owner of the Inheritance of both Cloſſes; and unity may not deſtroy the way; but that it is revived by the diſſeverance, as viceſimo primo Edvardi tertij fol. ſecundo. It was anſwered thereto, That it ought to have been ſo ſpecially ſhewn, which doth not appear here, and peradventure it will not ſerve in caſe of a way, but in caſe of neceſſity, as a water-courſe betwixt two houſes, or peradventure Incloſure or ſuch things which are of neceſſity, there he may ſo preſcribe, and the party ought to except them in his conveyance, Vide undecimo Henrici ſeptimi, fol. viceſimo quinto. And all the Juſtices held, That Inhabitants may alledge preſcription for a way to a Church or Market, which are of neceſſity, and in matter of diſcharge, as in modo decimandi, or to be quit of Toll; but not in matter of profit or charge in another ſoil, as Cok. lib. 6. fol. 60. b. in Gateways Caſe, 8 Ed. 4. 5. For Fiſhermen to dry their Nets, for the publick benefit or for eaſement, as 15 Ed. 4. 29. & 18 Ed. 4. 3. The ſecond exception, Becauſe the *Feme* joyned with the *Baron* in the Action for the ſtopping during the coverture, which ought not to be. *Sed non allocatur*; Becauſe the wrong was done to the *Feme*, and the *Baron* had it in right of his *Feme*. But for the firſt exception it was adjudged for the Defendant.

Ante 326. 2 Cr. 152. R. 527. 1 Vent. 97. 265. 275

Co. Lit. 110. b.

3 Cr. 459. Poſt. 438 3 Cr. 608, 613.

Hutchman *verſus* Porter. Ante pag. 286. & 315.

WAs now moved again: And the Court agreed, That the Judgment was good; for it cannot be intended, that he was acquitted of any other matter; therefore he was acquitted inde and it is certain enough; and the Writ in Firzh. N. B. 115. of Conſpiracy, is acquietatus, and he doth nay ſay inde;

9. 2 Cr. 131, 230.

and the presidents are both ways; for the two presidents in the Old Book of Entries, fol. 123. is acquietatus, omitting inde: And although the other presidents which are acquietatus inde, are the surest way, that doth not prove but where inde is omitted, it is good enough: Whereupon all the four Justices resolved, That the Judgment was good, and affirmed it accordingly.

Spencer *versus* Medburne and his Wife.

10. 1 Rol. 84. ACtion for words. Whereas the Defendants wife, having communication with J. S. of the Plaintiff, and intending to deprive him of his good name and fame, and draw him into peril of his life, such a day and year spake of the Plaintiff hæc Anglicana verba, Go tell my Landlord (innuendo the Plaintiff) he is a Thief, And I will cause him (innuendo the Plaintiff) to be hanged. The Defendants pleaded Not guilty, and it was found against them. And now Farrer for the Defendants moved in arrest of Judgment, Because it is not alledged nor averred, That the Plaintiff was her Landlord; and that the innuendo will not help it. But Taylor for the Plaintiff argued, For as much as it is layed, that communication was by the Defendants wife of the Plaintiff, and upon that communication it is alledged, That the wife said, de eodem querente, the said words, Go tell my Landlord (innuendo the Plaintiff) it is a certain description, that they were spoken of the Plaintiff: And when the Jury hath found them guilty, it proves that the words were spoken of the Plaintiff, who was her Landlord; otherwise it could not be found to be spoken of him. And of this opinion was Justice Jones and my self. But Berkeley and Brampstone chief Justice doubted thereof: For if the Declaration in it self is not certain by an innuendo to be spoken of the Plaintiff, the Verdict can never aid it. And it is not here shewn, that the Plaintiff was her Landlord; and she might have more Landlords; and non constat of whom she spake: Wherefore Curia advisare vult. And after it was advised, to avoid further question, That the Plaintiff should relinquish this Action, and amend this fault in the second. And it was ordered by consent.

Ante 177. Post. 497.

Price *versus* Parkhurst and others.

11. 2 Ro. 98. ERror of a Judgment in the Common Bench. Whereas an Action of Debt was brought by six Executors named in the Writ; and after three of them being summoned and severed, The three others bring Debt upon an Obligation made to the Testator. The Defendant pleaded Non est factum, and found against him, and Judgment for the Plaintiff. And now assigned for Error by Germin, Because there is not any mention therein of those which severed, for they

they being always Executors, ought to be named in the Judgment. And it was commanded, what they should search the presidents in the Common Bench, that the course was there, whether upon summons and severance, Judgment only shall be for those which prosecuted? And it was certified by the three Prothonotaries, that the course was so. And the Court (absente Brampston) were of opinion, That it is a good course, and no cause of Error; for the Executors which are severed, peradventure never proved the Testament, and it may be never will prove it or Administer: therefore when they are named in the Writ, and will not joyn, it is reason Judgment shall be only for those which prosecuted, without naming those which are severed: Whereupon rule was given, That Judgment should be affirmed, unless, &c.

Smith *versus* Smith.

ERror of a Judgment in the Common Bench. The Error assigned, Because the Venire facias was returned by Sir Richard Saltingston, Sheriff of Essex, in Crastino Martini, nono Caroli; and that then in Crastino Martini, nono Caroli, the said Sir Richard Saltingston was not Sheriff, but one Henry Smith. The Defendant in the Writ of Error saith, That Sir Richard Saltingston was made Sheriff of Essex before the return of the said Writ, viz. decimo Novembris, nono Caroli, by the Kings Patent, dated decimo Novembris, prout patet de recordo. Upon *Nul tiel Record* pleaded at the day, he procured in Court the Letters Patents, whereby he was made Sheriff. And it was moved by Maynard, That this ought to be tried *per pais*, whether he were Sheriff at such a day, and not by the Record of the Patent: For he might be discharged before the day. Sed non allocatur; For it shall not be intended, unless it were by pleading shewn unto the Court: Wherefore the Judgment was affirmed. 12. 5 Rol. 758. 2 Rol. 575. Post. 245.

Horn *versus* Barbar.

DEbt upon an Obligation. The Defendant demands *Oyer* of the condition, which was, That if he payed the rent, reserved upon a Lease of a Mill and certain Lands during the term of thirteen years, at the Feasts mentioned within the Lease, or within ten days, or within six months, (according to a latter agreement betwixt them) then the Obligation should be void. The Defendant pleaded the Indenture verbatim, which was of the Lease of a Mill and certain Lands mentioned therein, reserving the rent of 40 l. per annum, at the four usual Feasts, or within ten days after: And he pleaded, That he hath performed all the Covenants, payments, and agreements contained in the Indenture, 13. 1 Rol. 460, 461. Ante 76.

denture, ſecundam formam & effectum Indenturæ et conditionis prædict. And upon this plea, the Plaintiff demurred: And Keeling for the Plaintiff ſhewed for cauſe; for that the Condition is in the diſjunctive, viz. at the four feaſts, or within ten days after every feaſt, or within ſix months (according to the agreement) and therefore he cannot plead payment generally, for he hath election to pay it, at which of thoſe days he will. I was of opinion, That the Defendant might plead payment generally. But Jones and Berkeley againſt it, Becauſe the Obligation refers to one of the three times, viz. the four Feaſts, or within ten days after every of them, or within ſix months, where he hath election upon which of thoſe days he will pay: And he pleading, That he hath
2 Cr. 460. perfomed the Covenants, payments, and agreements, it is no Plea to this condition; Wherefore they gave Rule (abſente Brampſton) That Judgment ſhould be given for the Plaintiff, unleſs, &c. Vide 21 Ed. 4. 12. et 44. Keyleway 95. 38 H. 6. 26. Cok. lib. 8. 133. b. Cok. Lit. 303. b. 5 H. 7. 9. 22 Ed. 4. 44. And afterwards Judgment was entred accordingly.

Sydowne *verſus* Holme.

14. PRohibition. Suriniſing, That the Prior of Briſtoll was ſeiz-
1 Ro. 654. ed in fee of ſuch Land parcel of his Priory, and that he and all
Jones 368. his Predeceſſors, time whereof, &c. until the diſſolution, held the ſaid Lands, being parcel of the demeaſns of the ſaid Priory, diſcharged and acquitted from the payment of Tythes, for his Fermors and Tenants for life or years of the ſaid Lands, &c. And that the ſaid Priory was diſſolved by the Statute of 27 H. 8. and that the ſaid King was ſeized in fee of the ſaid Lands, &c. and ſhews the Statute of 32 Hen. 8. (that none ſhall be ſued for Tythes, who were diſcharged by the Laws and Statutes of the Realm) and the Statute of 2 Ed. 6. And that King Henry the eighth died ſeized of the ſaid Lands, and ſo conveys it by mean conveyance to Edward Bartell, and to the Plaintiff, as his Tenant for years: And that the Parſon of Briſtoll ſued him for Tythes, and upon that Prohibition the Defendant demurred in Law. And after arguments at the bar, it was argued at the Bench. The firſt queſtion was upon this diſcharge, being ſhewn to be, time whereof, &c. in a Spiritual perſon, viz. the Prior, Whether this privilege thereof be determined by the diſſolution of the Priory, or ſtill remains, and may be in the King and his Patentée, without the aid of the Statute of 27 et 31 H. 8. And I argued, That in regard it was diſcharged, time whereof, &c. in a Spiritual perſon (viz. the Prior and Convent) who were capable to have or to be diſcharged of Tythes, it being a privilege veſted in them, before the Councel of Laterane, (which was before any parochial right) it may by intendment be by compoſition

position real, then it shall go with the Land, as 8 Ed. 4. 11. & F.N. B. 41. G. That any Lay-person may have a composition, and thereupon may have a Prohibition, much more a Spiritual person may have it, by this means, &c. and it shall go with the Land, Vide 7 Ed. 3. 3. 10 H. 7. 18. That a Spiritual person may make such a prescription; and then being a prescription, fixed in a spiritual person, by the dissolution, it comes to the King being persona mixta, and from him to his Patentée, as Cok. lib. 2. fol. 44, 45. a. the Bishop of Winchester's Case, and Cok. 11. fol. 12. Priddle and Nappers Case. But Brampstone, Jones, and Berkeley, argued to the contrary, yet they agreed, That it shall be intended, that such discharge was by Composition real, and shall go with the Land, as the Case put of a common person, which is, that a Lay-person shall have advantage of a real composition, if he Hob. 309. can shew it. But because a Spiritual person may have divers causes of privileges, by grant, as well as by composition, and that in divers manners, it shall be intended the most general course, which is a personal discharge, which determines Hob. 42. with their Corporation, as in 3 Ed. 3. 11. And in favour of the Church, it shall be intended, that it was rather by grant of privilege, than by any real composition, and that the tythes are due to the Parson, and shall not be taken from him, unless that the discharge continue, which is not here shewn. The second main question was, Admitting that this discharge is by privilege granted to the Priory, which being one of the inferior Abbeys, came to the King by the Statute of 27 H. 8. being out of the value of 200 l. per annum, Whether this privilege be not meerly determined, Or whether it is not revived by the Statute of 27 H. 8. & 31 H 8. And in this point I argued, That it is aided by the Statute of 27 H. 8. because that gives the possession of the Abbeys to the King, in as ample and large manner as the Abbot had them, at the time of the dissolution, and it was discharged at the time of the dissolution. And if it be not aided by the Statute of 27 H. 8. yet it is to be aided by the Statute of 31 H. 8. by the general clause, which is That the King and his Patentées of any Monasteries, &c. shall have and enjoy the same, discharged of the payment of Tythes, &c. as the late Abbot, &c. had, held, and enjoyed, &c. And whereas it hath been objected, That this Statute extends only to Abbeys, which came to the King after the fourth of February 27 H. 8. But this Abbey came to the King the fourth of February 27 H. 8. and so excluded out of this Statute. I answered thereto, That this Statute extends to Abbeys surrendred, relinquished, renounced, or given up to the King after the fourth of February 27 H. 8. And that is intended to extend to all Abbeys, which are given by the Statute of 27 H. 8. for although it hath not relation to the fourth of February 27 H. 8. yet that is but a forein surmise, by such relations to prejudice the King, as it is Cok. lib. 3. fol. 29. a. Relations are but fictions, which shall not prejudice the King by such constructions: and in rei veritatis

veritate all the said Abbeys were surrendred, or relinquished after the fourth of February 27 H. 8. or during that Parliament: And the exposition hath always been, That this clause extend as well to Abbeys which came after the Statute of 27 H. 8. as to the superior Abbeys, and never any question made in these times, or in sirty years after the making of the said Statute. And therefore the Cases in 7 Eliz. rot. 245. betwixt and Hayant in this Court, and Pasch. 27 Eliz. rot. 328. betwixt Cogall and Fairfax in this Court, and Pasch. 37 Eliz. betwixt Smith and Patenson were cited, where Prohibitions were granted upon surmise, that the Lands came to the King by the Statute of 27 H. 8. and that in 40 Eliz. rot. 679. betwixt Berly and Walter a Prohibition upon the surmise, for this Land was granted; where it being in question, Whether where continual usage had been, that as well for inferior Abbeys given to the King, by the Statute of 27 H. 8. as to Abbeys which came after, and held their Lands discharged, such Prohibitions should be granted? I held it to be an equal mischief, as well for the one, as for the other, and that the Statute extends equal remedy. And so the exposition hath been always taken by the practise. But Brampston chief Justice, Jones and Berkeley argued to the contrary, That the Statute of 27 H. 8. doth not preserve or revive this privi-
2 Cr. 608. Co. 2. 49. ledge, because there be not any words, that it shall be discharged as the Abbot held it, but that the King shall have it, in as ample manner and form as the Abbots held it. And general words will never preserve the priviledge, and immunities which were determined, unless by special Statute they be revived: And the Statute of 31 H. 8. doth not extend unto them; for all the scope of the said Statute, is only to extend to Abbeys which came to the King after the fourth of February 27 H. 8. And all Abbeys which came to the King by the Statute of 27 H. 8. came unto him the fourth of February 27 H. 8. And to those the Statute of 31 H. 8. doth not intend to extend; For in every Branch are mentioned only the Abbeys, &c. which came to the King after 27 H. 8. And although this clause to be discharged of Tythes, in the body of the said clause, is any Monasteries, &c. yet it is after the said late Abbots, &c. and Abbots be not mentioned before in that clause, and therefore it ought to be expounded and coupled with the clauses before, which mentions and intends only what came to the King after the fourth of February 27 H. 8. and doth not extend to Abbeys, which came to the King the fourth of February 27 H. 8. And Jones said, Although it is no Statute until the end of the Sessions when the
Hob. 111. 4 Inst. 25. King assents, yet when there hath been a Session, it shall have such relation to the first day of the Sessions, that they vest actually in the King the said fourth day of February 27 H. 8. That the King shall have the rents incurred after the first day, and before the last day: And if they be paid in the interim to the Abbot, they shall be paid again to the King. And Jones and Brampston relyed upon a
Hob. 309. 10. Judgment 18 Jac. in the Common Bench betwixt Gerard and Wright.

Wright, where it was held upon solemn argument, by Hubbert, Winch, and Hutton, Justices, that the Statute of 31 H 8. doth not extend to Abbeys which came to the King, by the Statute of 27 H. 8. And that in this Court in the case of Whitton and Weston, for the possessions of the Abbey of Saint Johns of Jerusalem 4 Caroli, where the question being, whether the said Abbey came to the King by the special Act of 32 H. 8. All the four Justices agreed, That the case of Gerrard and Wright was good Law, that the Abbeys which came to the King, by the Statute of 27 H. 8. were not within the privilege of 31 H. 8. nor to have the benefit of that Statute. And Berkeley Justice insisted much, that this privilege to be discharged of tythes, being a meer personal privilege, was determined by the dissolution of the Abbeys, and tyed only to their bodies and persons, nor can be revived without especial words, which are not in the Statute of 27 H. 8. And that although the Statute of 31 H. 8. extend to the said Abbeys suppressed by the Statute of 27 H. 8. yet there is a saving in the said Statute of 31 H. 8. of all rights and interests besides, to the Donors, Abbots, &c. wherefore for the reasons before, but principally for that the Abbey dissolved appeared to be suppressed by the Statute of 27 H. 8. By the opinion of the said three Justices, it was adjudged for the Defendant; And that consultation should be awarded. Hob. 309. 2 Cr. 608. Jones 23. Lat. 89. Bridg. 32. Benl. 168. 185. Godb. 392.

Smith *versus* Smith. Mich. 10 Car. rot. 142.

ERror of a Judgment in Formedon in Remainder in the Common Bench; where the Judgment being for the Demandant, and the Judgment in this Court affirmed; Whitfeild Serjeant moved to have costs assessed to the Defendant in the Writ of Error, because that this writ was brought before execution, and thereby the execution delayed according to the Statute of 3 H. 7. But it was resolved, that for as much as there were no costs nor damages recovered nor allowed in the first action; so that no execution is delayed, but only for the Land, that in this case no costs are allowable by that Statute; Whereupon it was ruled accordingly. 15. R. 93. 704. Ante 421.

William Byrte *versus* Manning.

DEbt upon a Obligation, conditioned for performance of Covenants. The Defendant demands *Oyer* of the Condition, and pleads performance. The Covenants were, that Thomas Byrte, Son of Will. Byrte, should espouse Anne daughter of the said Manning: And in consideration of this marriage, Manning covenanted to pay 300 l. And William Byrte covenanted to assure such 16.

Lands to the said Thomas and Anne, for her Joynture. And there were other Covenants for the value thereof and quiet enjoyment. And amongst others, Manning covenants, That he will procure the said Thomas Byrte to be presented, admitted, instituted, and inducted into such a Benefice upon the next avoidance of the said Church. And the breach assigned was, for not performance of the said Covenant of procuring him to be admitted, instituted, &c. And upon this breach assigned, the Defendant demurred, Because this Covenant is against Law, being a symoniacal agreement; and a Bond for performance thereof is not good. But all the Court held, that if it Ante 361. had appeared to have bin, that in consideration of the marriage of his Son, &c. he would procure him to be presented, admitted, instituted and inducted into such a Church, that had bin a symoniacal Contract, and had avoided the Obligation. But here this Covenant is not in consideration of the said former Covenants, nor depending upon them, But it is a meer distinct Covenant by it self, and independant upon the former: And without special averment or shewing, That it was a symoniacal Contract, it shall not be so intended. But it may be a Covenant upon good consideration; wherefore it was adjudged for the Plaintiff.

Tyffyns *versus* .....

17. 1 Ro. 756. 767. Jones 367. ERror of a Judgment in the Common Bench. The Error assigned was, because the action was brought against two, and issue joyned by two Defendants; And after issue joyned, one of the Defendants died, notwithstanding there was a Venire facias awarded to trye the issue betwixt the Plaintiff and the said two Defendants: And the Venire facias and Habeas Corpora, and the Issue found, mentions, that it was betwixt the Plaintiff and two Defendants. And although it be surmised, that he died before Judgment, so no Judgment is to be given against him, yet he ought to have surmised it before the issue tryed; and therefore Henden Serjeant, very much urged it to be an Error. But it was resolved by all the Court, that such surmise needs not to be in judicial process to alter it: And therefore although a Venire facias issued against a dead person, yet one of the Defendants being alive, is sufficient, and no cause of Error. Vid. 3 H. 7. and 4 Hen. 7. 7. for this point: Whereupon the Judgment was affirmed.

Digbie *versus* White.

18. Post. 518. 574. DEbt upon an Obligation of 20 l. dated 24. Junii 9 Caroli. The Defendant pleaded, That the Plaintiff 22 Februarii decimo Caroli, released unto him all Actions and Demands which he had, &c. The Plaintiff demands *Oyer* of the release, which was a Re-

a Releaſe of all Actions unto the 14. of January, before the date of the Releaſe. So it is not a Releaſe of all Actions, untill the day of the Releaſe. And for this miſpriſion, the Plea was adjudged ill, and the Plaintiff had Judgment.

Stone *verſus* Newman in the Exchequ. Chamb. Paſch. 7 Car. rot. 115.

REplevin *ſur* Demurrer in Banco Regis. The Caſe was ſuch, Sir Thomas Wyat was Tenant in tayl to him and his heirs males of his body, of the gift of King Henry the eighth, Reverſion to the King in fee; and he being ſo ſeized, infeoffed thereof George Moulton and his heirs, triceſimo quinto Henrici octavi, to the uſe of him and his heirs: He had iſſue George Wyat, who had iſſue Sir Francis Wyat, in whoſe right the Defendant diſtrained for damage feſant, and made conuſance. The Plaintiff ſhews, that the ſaid Sir Thomas Wyat, who made this feoffment in primo Mariæ, was attainted of treaſon and executed: And this attainder was the ſame year confirmed by ſpecial Act of Parliament. And by ſpecial words, that he ſhould loſe and forfeit all his Lands and Tenements; And that they ſhould be veſted in the Queen and her Succeſſors without Office. Upon all this matter diſcloſed in pleading, the queſtion was, Whether after this feoffment Sir Thomas Wyat had any eſtate or right remaining in him, which is not forfeited and given to the Queen by this attainder and Act of Parliament? For if it be forfeited, the Plaintiff who claims under the Queens Patent, is in, and hath good title, and Judgment ought to be given for him: But otherwiſe, Judgment ought to be given for the Defendant, who claims under Sir Francis Wyat, the Iſſue in tail. And after divers arguments in the Kings Bench at the Barr, although there was not any variety of opinions of the Juſtices of the Kings Bench diſcovered, yet becauſe it was a caſe ſo long controverted, and the ſame caſe in ſubſtance which was reported by Mr. Plowden in Walſinghams Caſe adjudged in the Exchequer; and afterward in the Common Bench to the contrary in Auſtins Caſe, The Court adjourned it into the Exchequer Chamber to be argued before the Juſtices & Barons of the Exchequer. And after divers arguments at the Barr, it was argued ſolemnly in the Exchequer Chamber by all the Juſtices and Barons of the Exchequer, beſides Richardſon chief Juſtice, who died whilſt the argument was depending, and Brampſton made chief Juſtice; and it was argued by Ric. Weſton puiſny Baron of the Exchequer, and by Sir Francis Crawley puiſny Juſtice of the Common Bench the firſt day, for the Plaintif. And upon the ſecond day by Sir Rob. Berkeley puiſny Juſtice of the Kings Bench, and Sir George Vernon Juſtice of the Common Bench, for the Plaintiff; and afterwards upon a third day by Sir Tho. Trever Baron of the Exchequer, for the Plaintiff; & by my ſelf for the Deft. And after, upon a fourth day, by Jones & Hutton Juſtices, for the Deft. 19. Pl. Com. 547.

And after upon another day, by Baron Denham for the Plaintiff, and at another day, by Sir Humphy Davenport for the Plaintiff, and after upon another day in this Term, by Sir John Fynch chief Justice of the Common Bench for the Defendant (but I being sick at the time of his argument, did not hear it:) And Brampton chief Justice did not argue, because he was made chief Justice after the Argument begun; and the chief baron and other the Justices and barons, which argued on the Plaintiffs part, much insisted upon the Argument and reasons given by Sanders in Walsinghams Case, Plowd. Commentarie. First, because, it being a feoffment by Tenant in tail of the gift of the King (the Reversion remaining in the King at the time of the feoffment) there is no discontinuance of the Estate tail; for it cannot discontinue the Reversion in the King: and therefore the Estate tail remained in him at the time of the attainder; and the forfeiture thereof vested in the King by the Statute of 26 H. 8. (Note, They all agreed, that if Tenant in tail of a common person makes a feoffment, where no Reversion is to the King, it is a discontinuance; and if he be attainted of Treason, there is no forfeiture to the King, as Co. lib. 3. 2. b. Marquels of Winchesters Case is. Secondly, That if the Estate tail be not in him to be forfeited, yet the right of the intail remains, which is forfeited and given to the King by the Statute of 33 H. 8. or by the private act made in primo Mariæ, which gives all Estates and Rights, &c. And although that a feoffment gives all Estates, Interests, and Rights, in case where Tenant in fee makes a feoffment, yet it is not so in case of a feoffment made by tenant in tail, because the Estate tayl is an Incident inseparable to his person and blood, and cannot be transferred to any other: Which is the reason, That one cannot plead a Que Estate of a Tenant in tail. The third reason, because the privity of Estate remains betwixt the Donor and him, and cannot be transferred over; and much more stronger, where the Reversion is to the King, the privity remains in him, for the benefit of the King: Which is the reason, that the Donor may avow upon him for his rent, and shall not be compelled to alter his Avowry, as 48 Ed. 3. 8. 5. Ed. 4. 34. 4 Hen. 4. 32. And that if his heir within age recovers in a Formedon, he shall be in ward: And in case of the King, where tenant in tayl, remainder in the King, makes a feoffment, yet his heir within age shall be in ward to the King before entry or recovery, as Fitzh. Nat. brev. by reason of the privity betwixt the King and his Tenant in tayle, which cannot be altered. The fourth reason, which they much insisted upon, was, that the right alwaies remained in him, and is forfeitable by the Statutes of 33 H. 8. and primo Mariæ: For the Writ of Formedon in the descender supposeth quod descendit jus; and the Declaration mentions as much, which alwayes ought to comprehend truth; which proves, that the Law accounts the right to be in him, and from the father descended to his Son; and then being in him, it is forfeitable by his attainder of Treason The fifth

Co. Litt. 335. a
Pl. Com. 561.

Hob. 343.

Pl. Com. 561. a.

Co. Lit. 121. a

Hob. 337.
Pl. Com. 161. a.

Hob. 337.
Pl. Com. 561. a.

fifth reason, that it is for the greater benefit of the Crown, to expound it most strongly against Traytors and their Issues, for the Kings profit and discouragement of Traytors, that they should not hope their Issue should inherit: And they much relyed upon the Judgment in print in Plowd. Comm. in Walsinghams Case. And they said, although it were questioned by a writ of Error, yet it was affirmed, and the Land enjoyed always after the Judgment, And upon the Case of the Lord Sheffeild, 21 Jacobi, which was adjudged upon a Writ of Error, brought in the Exchequer Chamber, where the Judgment was, That the Land of Tenant in tayl, after a feoffment was forfeited to the King. But against that it was argued, by Justice Hutton, Justice Jones, and my self, and by the Lord Finch (as I heard concurring with our reasons) That the Judgment ought to be given for the Defendant. First, That although the reversion is in the King, and there is no discontinuance; yet all is divested out of the feoffor, as strongly as if there had been a discontinuance: And if it had been a feoffment by Tenant in tayl, the reversion to a common person, after such feoffment and discontinuance, nothing remained, and nothing can be forfeited, as it is agreed, in Coke lib. 3. fol. 2. the Marquels of Winchesters case, & there fol. 11. a. Doubtyes case, that right of entry is only forfeited, & not right of action: And although it hath been much insisted on by the other side, that when there is no discontinuance, no Estate passeth, but for the life of tenant in tail; so that the reversion of the Estate and the right remain in him; and urged it out of the words of Littleton, that no estate passeth but for the life of Tenant in tail. Yet it was thereto answered, that clearly an Estate in fee passeth to the feoffee, descendible from him to his issue, and whereof the wife of the feoffee shall have Dower, and the feoffee shall have after a recovery by default a writ of Right, and a Quod ei deforceat, And the intent of Littleton is, That the feoffee or grantee of the reversion hath no more right to the Estate, than for the life of Tenant in tayl. But the fee in the interim passeth to the feoffee, as in case of exchange, 9 Ed. 4. 22. 8 H. 6. 23. and in the case of the grant of a reversion, 24 Ed. 3. 28. 13 H. 7. 10. 21 H. 7. 41. and Co. lib. 10. fol. 96. a. Seymors case; and Cok. lib. 3. fol. 84. b. in the case of Fines and 22 Ric. 2. Discontinuance 50. and Plow. 557. And if tenant for life, reversion to the King, makes a feoffment, it cannot touch the reversion in the King, nor a fee descendible passeth. But where Tenant in tayl, reversion to the King, makes a feoffment, there a base fee shall pass, determinable by the entry of the issue in tayl. But out of an Estate for life, where the reversion is not touched, no fee shall pass but only an Estate which passeth as an Occupancy, as the difference is, Cok. Litt. 339. b. Tenant in tayl, reversion to the King is disseized, and a discent cast, it is good, and shall binde the issue. But Tenant for life, the reversion to the King, is disseized, No discent can be cast, because a fee cannot be extracted out of an Estate for life, And 18 Ed. 3. 12. where Tenant in tayl, reversion to the King,

Hob. 344.

Hob. 343.

Litt. Sect. 650.

Co. Litt. 335. a.

King, makes a Leaſe for life, he gains a new reverſion, and it ſhall deſcend to his iſſue. And Jones cited a caſe Paſch. 39 Eliz. betwixt Stratford and Dove, That a diſcent upon tenant in taple, reverſion to the Queen, ſhall barr the entry of the Tenant in taple, and his iſſue. Secondly, although it was ſaid, that the privity of Eſtate cannot be drawn out of him; They anſwered, True it is, none can be Tenant in tayl, but the Donee and his iſſue, and that Avowry ſhall be made upon him, and his Heir ſhall be in Warde. So where Tenant in Dower, or by the courteſie, alien their Eſtates, no eſtate remains in them; yet for the privity which was once in them, an Action of Waſte lies againſt them, as Fitzh. N. B. 55 E. is And quoad the avowry, that may be; for otherwiſe the Donor ſhould conſeſs his Reverſion to be out of him, and thereby ſhould deſtroy his Avowry, as Co. Lit. 269. a. is. And for the wardſhip, though the privity betwixt the King and the Tenant in tayl is deſtroyed, the iſſue in tayl cannot contradict it. And to the objection, That the Reverſion being in the King, is not touched, & of neceſſity the particular Eſtate muſt remain, for the upholding of the Reverſion; and that there cannot be a Reverſion, but in regard of a particular Eſtate remaining: It was thereto anſwered, That a common recovery, before the Statute of 34 H. 8. had barred an Eſtate tail, where the Reverſion in the King was not touched: And the Recoveror ſhould have a Fee during the time, that the Tenant in tail had iſſue, as 28 H. 8. Dy. 31. & 15. Ed. 4. 9. Lord of a Villaine tenant in tail enters, that ſhall not touch the Reverſion, and Cok. lib. 2. fol. 15. b. in Wiſemans caſe, Where Tenant in tail of the gift of a common perſon, remainder to the King at this day, ſuffers a common Recovery: It ſhall barr the Eſtate tail, but not the remainder; and Plowd. Comm. fol. 557. Tenant in tayl of a common perſon is attainted of treaſon, the King ſhall have a fee, yet the Fee of the Donor is not touched. Thirdly, they all argued, that againſt his feoffment no right remained in him, nec jus in re, nec jus ad rem: For the Feoffment gave away all his right, intereſt, and poſſibilities, as 9 H. 7. 1 39 H. 6. 43. 12 Ed. 4. 32. 1 Ed. 4. 81. 19. H. 7. & Plow. 374. Tenant in tayl makes a feoffment, there remains no right in him, and if afterwards a fine be levied by the Conuſee, the iſſue in tayl is the firſt who hath right to impeach it. To the fourth, That the Writ and declaration in a Formedon, do ſuppoſe quod jus deſcendit, It was anſwered, that it was but form and not in rei veritate; and he doth not ſay ſimpliciter deſcendit jus, But deſcendit per formam Doni; and it is not properly ſaid deſcendit jus, but devenit jus, as Plowd. 374. by Southcote, Weſton and Dyer, and it is but form, as in Waſte, ſuppoſing that he held ad terminum annorum where he held but for half a year, and 40 Ed. 3. 5. & 38 H. 6. 3. in. con imili caſu, ſuppoſing that he alienes in Fee, it is good though he alienes but for life. So in the caſe of Holland and Lee, where a fine was levyed, and by it the Eſtate Tayle barred, in Error to reverſe this, it is ſuppoſed quod remanſit jus, or quod

3 Cr. 595. Co. Lit. 373. a. Mo. 467.

Co. Littl. 54. a.

Pl. Com. 555. a. Co. Lit. 335. a.

Pl. Com. 555. a.

Co. Littl. 372. b.

Hob. 337.

quod descendit jus, as the case requires. To the fifth, That it is for the greater benefit to the Crown, and the greater discouragement of Traytors, &c. It was answered, that the right was to be respected; and it is not to be presumed, that they would commit treason, or had an intent thereto; For such foreign intendments, are not to be presumed, as 30 H. 6. Grant. 41. Grant of Land after it shall Escheat, is void, because it is not intendable. And as to the cases pretended to be adjudged, It was answered, that Walsinghams case was impeached by a Writ of Error, and was affirmed for default in the pleading; and being demanded, If it were for matter of Law? It was not answered: And if it had been for the matter in Law; they would have been ready for the Queens advantage to have had it so published. Also within two years after (viz. in 18 Eliz. in the Common Bench in Moultons case) it was argued openly by all the four Justices, who by intendment had notice of the former Judgment, and they all argued, that the Estate Tayl was not forfeited, by reason of this Feoffment which saved it, and this Judgment was never impeached by a writ of Error, yet it is very likely, if the Justices of the Kings Bench had concurred with the Barons, for the matter in Law, the said last Judgment would have been impeached by a Writ of Error. And as to the Judgment in Sheffeilds case, It was alledged to be very well known that some of the Judges who died before their opinions delivered, were against the said Judgment, as appeared by their arguments, and that the Judgment in that Case, was obtained by one voice only. And although that Judgment should be allowed to be good, yet it much differs from this case: For here the Tenant in tayle hath neither Freehold, Possession, nor Right. But after this Term, because the greater opinion was for the Plaintiff, it was prayed in the Kings Bench, to have Judgment for the Plaintiff. But there it was moved in stay of Judgment, That the Barr to the Avowry was not good; First, Because it doth not shew, That after the Attainder of Sir Tho. Wyat, there was any seisin for the Queen: And Sir Francis Wyat had good title until seisin. Secondly, Because it is pleaded, that the Endictment and proceedings were before the Commissioners, and does not say sub magno Sigillo. And for these causes the Court would advise. Residuum postea 460.

Termino

Termino Hillarij, anno undecimo *Caroli* Regis, in Banco Regis.

1. Jones 375. *Memorandum*, That in this vacation, after *Mich.* Term, Sir *Fran. Aſhley* (the Kings Serjeant) who died the day before the end of the Term, in *Serjeants Inn*, *Ro. Maſon* of *Lin. Inn* Eſquire (Recorder of *London*) who died in *Lincolns Inn* 21 December; And Sir *Walter Pie* of the *Middle Temp.* Knight (Atturney of the Court of Wards) who died the 25 of *December*, were carried down and buried in their ſeveral Countries, accompanied with two Heraulds in their Coats of Armes, with divers Coaches of Nobles & others, who accompanied their Bodies untill beyond *Charing-croſs*. And *Henry Calthorp* of the *Middle Temple London*, was made Recorder of *London*, & ſo continued three weeks, & afterwards he was Knighted & removed, & made Atturney of the Court of Wards, the firſt day of this Term; And *Thomas Gardener* of the *Inner Temple* Eſquire, was elected Recorder of *London*.

Spooner *verſus* Day and Maſon Mich. 6. Car. rot. 183.

2. Jones 375. 1 Rol. 401. 2. 565. b. ERror of a Judgment in the Common Bench, in an Action upon the Caſe. Whereas Robert Futter was ſeized in Fee of the Manor of Thompſon, and he and his anceſtors, &c. time whereof, &c. had a fold-courſe for his and their Sheep not exceeding 300 in 70 acres of Land, in Thompſon, every year from 14 days after the Corn was carried away, to continue until our Lady, within the Lands not ſown again: And ſhews that he let by Deed to the Plaintiff 75 acres, parcel of the Manor, with the Fould-courſe, for five years, and that the Defendants incloſed, and thereby had diſturbed him of his Fold-courſe. One of the Defendants pleaded Not guilty, the other pleaded in Barr, that there is a cuſtome within the ſaid Will, that any one may incloſe any part of his Lands lying in the Common fields, and therefore he incloſed this Land, lying in the Common field, and it was hereupon demurred: And without any difficulty, adjudged that the Barr was not good, Becauſe he doth not traverſe the preſcription in the Declaration: And he cannot plead a preſcription againſt a preſcription. But he ought to anſwer the preſcription alledged in the Count: And in the Common Bench an exception was taken to the Declaration, that it was not good, Becauſe a fold-courſe being appurtenant to a Manor, cannot be divided and annext to parcel thereof: And therefore that the Plaintiff had not any title. But the exception was there overruled and adjudged for the Plaintiff: And this point was now

2 Cr. 519.

aſſigned

assigned here for Error; and after divers arguments, the Court this Term adjudged it to be good enough: For being but in nature of a Common certain, it may be well divided or anhert to parcel of the Manor; and there cannot be any prejudice to the Ter-tenants; for they shall not be charged with more than they were before; wherefore the Judgment was affirmed. Vide 5 H. 7. 7. 1 H. 7. 24. 1 Ed. 3. 1. 27 H. 8. 10. 11 H. 6. 22.

Richard Hayes *versus* Robert Hayes. Hill. 10 Car. rot. 1045.

DEbt. Upon an Obligation of 1000 l. conditioned for the performance of the Arbitriment of Henry Clerk and Robert Sharp, of the Middle-Temple Esquires, of all controversies and demands, betwixt the said Richard and Robert. The Defendant pleaded quod nullum fecerunt arbitrium: The Plaintiff shews, That Robert Hayes, Father of the Plaintiff and Defendant, was seized in fee of divers Lands in Kent, and had issue the Plaintiff and Defendant, and William; and devised divers Lands to the said Robert and William; and that there were controversies betwixt the Plaintiff and the said Robert and William concerning the said Land, for which the Plaintiff entred into bond unto the said Robert and William, to perform the award of the said Arbitrators; And that Robert at that time entred into one Bond by himself, and William, at the same time into another Bond, to perform the said award; And shews their Arbitriment, That Richard should release to the said Robert and William, &c. and that Robert and William should pay to the said Richard 300 l. at such a time and place; And for non payment of the said 300 l. the breach was assigned: whereupon the Defendant demurred. And Farrer argued for the Defendant, That this Arbitriment is void; For the Defendants Bond is for a reference of all Controversies betwixt Richard and Robert, and William is not mentioned in the Bond: And the award is betwixt Richard, Robert, and William; and that William and Robert should pay such a sum; and the breach is alledged therein; And for any thing that appears in the Bond and Condition, William is a Stranger to the submission, unless by this collateral surmise, which surmise is not allowable: Also this surmise is quasi a departure from the Declaration: But after divers arguments at the Bar, the Court resolved, for as much as this is not a bare surmise, but grounded upon a Deed, which is of as high a nature as the other, and made at the same time; it is quasi but one submission by several Bonds, and so the surmise is allowable, and stands well with the Bond in question. And although the two Brothers did not joyn in one Bond of submission, because they would not be bound one for the other; Yet when at the same time they enter into several Bonds to perform the award, it is but as one submission, and is not any departure from the Declaration; For it is not fitting that the Declaration (which is but for the

3. 1 Rol. 415.

1 Rol. 248.

Pl. Com. 285. b.

debt upon the bond of Rob.) should mention any such submission; but it sufficeth to shew it by the replication, to maintain this Arbitriment; and therefore all the Court resolved, That the replication was good enough, to maintain the Arbitriment, notwithstanding this objection. The second objection was, That this Arbitriment was not good, because the submission was only for Land, whereof the father was seized at the day of his death, and devised, or mentioned to be devised to the said William and Robert, or to the use of them: And the Arbitriment is, That he shall make a release of his right in the Lands conveyed or devised, and there is no authority to meddle with the Land conveyed. Sed non allocatur; For it shall not be intended that there were any Lands conveyed, to make the Arbitriment void, unless it had been shewn: And the breach is assigned for the non payment of the 300 l. awarded; Wherefore rule was given, That Judgment should be entred for the Plaintiff.

1 Rol. 242.

Bradstock *versus* Henry Scovell and others.
Trin. 11 Car. rot. 1097.

4. ERror of a Judgment in the Common Bench in an Ejectione firmæ, of a Messuage and Land in Wickhampton, of a Lease by Tho. Baston to the said Henry Scovell; Where, upon Not guilty pleaded, and a special Verdict found, the Case was, Thomas Baston seized in fee of those Tenements, conveys them to the use of Thomas Baston his son, and Edith his wife, and the heirs of their bodies, for a Jointure for his wife: Thomas the son and Edith enters; and being seized in tail, have Issue Philip their eldest son, and Thomas the Lessor, their second son, Thomas their Father dies, Edith takes to her second husband Thomas Bulford; They by Indenture for 6 l. alien, bargain, sell, and grant to the said Philip and his heirs, all their Right, Title and Interest which they have in the said Tenement, no Livery nor Inrollment being found. Then the said Philip Baston, by Indenture for 80 l. bargained, sold, and confirmed those Tenements to one Henry Bradstock, and levies a Fine with Proclamation, to the said Henry Bradstock, to the use of him and his heirs; And afterward Philip dies without Issue, then Edith dies; After the said Thomas Baston the second son enters and makes this Lease, and the Defendant *ousts* him; Et si super, &c. The sole question was, Whether this Fine by Philip the eldest son, in the life of his Mother, Tenant in tail, and he dying without Issue in the life of his Mother, shall bar Thomas the second son, or not? And after argument at the Bar and Bench in the Court of Common Pleas by the opinion of Heath Chief Justice, Hutton and Vernon, it was adjudged for the Plaintiff, That this Fine should not be a Bar to Thomas; (but Crawley to the contrary.) And now Error being brought, was assigned in point in Law: And after several Arguments at the Bar, all the four Justices agreed, That the

Jones 34.

Judg-

Judgment ſhould be affirmed: For this Fine levied by the eldeſt ſon, who was never ſeized by force of the Intail, and dying without Iſſue, before the Intail deſcended upon him, Is not a Fine within the Statutes of 32 H. 8. nor of 4 H. 7. to bar the Intail; For although he be inheritable to the Tail, and if he had ſurvived, his Fine had been a bar to his Brother, yet foraſmuch as he died in the life of his Anceſtor, and never had the Eſtate Tail, The younger brother ſhall never mention him in a Formedon in the Deſcender, he never being Anceſtor in Tail to his younger brother, nor any ſuch Anceſtor, to whom the Land was Intailed; and therefore it is not like unto Archers Caſe, Where the Father diſſeiſes the Grandfather, or is infeoffed by the Grandfather, and levies a Fine with Proclamations, and dies in the life of the Grandfather, and afterwards the Grandfather dies; his ſon ſhall be barred: For he ought to claim by him, and he is one to whoſe Anceſtors the Land was intailed. And it was compared by Berkeley to the caſe where the Father is attainted of felony in the life of the Grandfather and hath iſſue a ſon, and dies; afterward the Grandfather dies, the Land ſhall Eſcheat: for the ſon ought to make his deſcent by him, which cannot be. But if the eldeſt ſon had been attainted in the life of the father, and had died without iſſue in the life of his father, his ſecond brother ſhould not have been barred. But if the eldeſt ſon had ſurvived the father, and died after without iſſue, his younger brother ſhould never have inherited. And for this point Jones ſaid, That when he was a Judge in the Common Bench, it was ſo adjudged in the caſe of Mackwilliams, and ſo alſo in this Court, in the Caſe betwixt Croker and Kelſey, and afterward affirmed in a Writ of Error. And although Littleton ſaith, That if the middle brother makes a warranty and dies without iſſue, his warranty is lineal to his younger brother; for that by poſſibility the younger brother might have inherited, ſo as he is, quodammodo, ſaid to be his Anceſtor, yet that is only but a poſſibility, and by reaſon of the Maxime; but it is not to be conſtrued ſo here in the Caſe of a Fine: For it ought to be levied by him who had the Eſtate tail once in him, or to whoſe Anceſtor the Land was intailed, and by whom the conveyance by deſcent ought to be made. But where he needs not to be mentioned in the conveyance by deſcent, there his Fine ſhall never bar. And Grants Caſe was cited; where Lands were deviſed to one, when he came to the age of twenty five years, in tail, and he, before the age of twenty five years, levies a Fine with Proclamation, and after attained the ſaid age, and had iſſue and died, this Fine ſhall bar the iſſue. For although he was not Tenant in tail at the time of the Fine levied, yet having attained the age of twenty five years, he was the perſon to whom the Land was intailed; ſo he is within the words and intent of the Statute, That this Fine ſhall bar his iſſue which claim under that intail; wherefore here in the principal Caſe,

Hob. 332. Moor 252.
Poſt. 525.
Hob. 258, 332, 333.
Co. 8. 88. b.
Hob. 333. 258. Co. 3. 90. b.
Hob. 334. Dier 48. a. Jones 94.
Hob. 258.
Hob. 333. 2 Cr. 689. Poſt. 478. Jones 601.
Co. 10. 50. a. 3 Cr. 122.

all the Justices agreed, That the Judgment was well given; wherefore the Judgment was affirmed.

Salter *versus* Browne. Hill. 10 Car. rot. 207.

5. ERror of a Judgment in the Common Bench, in an Action for words. Whereas one Jane Jennings was delivered of a Bastard child, That the Defendant, having communication with one J. S. of the Plaintiff, and of the said Bastard child, said of the Plaintiff these words, He (innuendo the Plaintiff) is the reputed father of that Bastard child, (innuendo the said Bastard child.) Judgment after Verdict was given for the Plaintiff, and Error thereof brought and assigned, That these words be not actionable. And of that opinion was all the Court (absente Brampston) unless he had alledged some temporal loss (viz.) that he lost thereby his marriage; Or that he, by this means, should be chargeable for the maintenance of such bastard child, and to have further punishment: For it was said that it had been resolved, That a bastard child of persons able to keep it, and not like to be chargeable to the Parish, is not within the Statute of 18 Eliz. And a reputed father is to be adjudged by the two next Justices of the Peace, or the Sessions: Wherefore, for this cause, the Judgment was reversed. Hill. 10 Car. rot. 752. such a Case and such Judgment.

Ante 322. 2 Cr. 473. 1 Rol. 37.

Clothworthy *versus* Clothworthy.

6. ERror of a Judgment in a Writ of Annuity, Where the Plaintiff declares against the Defendant, as Heir to his Ancestor, who granted an Annuity unto him of 20 l. per annum, payable at four Feasts, viz. at Christmas, the Annunciation, the Nativity of Saint John Baptist, and Saint Michael, and for 30 l. arrear at Mich. 3 Car. before the Writ brought, which was the sixteenth of April 4 Car. &c. The Defendant pleads, Non est factum Patris sui, and found against him, and Judgment given, that he should recover the annuity and arrearages before the Writ, and what incurred pendente brevi, which amounted to seventy pounds and the damages and costs. Et quod habeat executionem of all the Tenements descended unto him, from the Grantor of the Annuity: And error being brought, it was assigned by Maynard, because the Plaintiff demands this annuity and the arrearages thereof unto Mich. 3 Car. And his Writ is brought 16 Apr. 4 Caroli; so as there be two quarters of that annuity not demanded, which by intendment are paid: And if they be not paid, he ought to have demanded them. For if one brings Debt for part of a Debt, due upon a Contract or upon an Obligation, and doth not acknowledge satisfaction of the residue, the Action is not well commenced; Also, whether it be due or not due, the Judgment is erroneous: For the Judgement is, That he shall recover the arrearages due before the Writ (which

2 Cr. 499. Ante 104, 137. 2 Ro. 71. Het. 137.

(which includes these two quarters rents which are not demanded) and the arrearages accrued pendente brevi, amounting in toto to 70l. so as it includes the arrearages before, and hanging the Writ. But Rolls answered thereto, That this peradventure was but the misprision of the Clerk, in casting up the sum; and then it is no error, but amendable. But the Court answered, and so resolved, That it was no misprision in the casting up, but a misprision in the Judgment: Wherefore they all held, That it was erronious. The second Error, Because the heir pleading a false plea, which is found against him, The execution ought to be awarded of his proper Lands, and of his Lands descended. But the Court held, That the denying the Deed to be his fathers, was not a false plea in his cognisance. And although it should be false, yet being charged in respect of his Ancestors Deed, The Land of his Ancestors shall only be taken in execution; for that is the cause of his charge: And if the Land of the heir, which is his own proper Land, should be liable as well as the Land of his Ancestor; yet it is not assignable for Error, because it is in ease and advantage of the heir. But for the first cause rule was given, That the Judgment should be reversed, unless, &c. Pl.Com.440. Dier 81. a.

Tregmiell and his Wife *versus* Reeve.

7. ACtion upon the Case, and declares, That Sir John Reeve was seized in fee of a Farm and of an hundred acres of Land thereto appertaining; And by Indenture, covenanted to stand seized to the use of himself and wife for their lives, for a Jointure for his said wife; and after to his son and heir, excepting the timber trees, saving that his said wife shall have and take the throwds and loppings of them: And that the said Sir John Reeve died, and she survived, and took to husband the Plaintiff: And that the Defendant, as heir to Sir John Reeve, cut down five Oaks growing upon the said hundred acres, whereby the Plaintiff lost all the benefit which he might have had of the throwds and loppings of the said trees. The Defendant pleads Not guilty, and Verdict being given against him, Hide took divers exceptions in arrest of Judgment, First, That the excepting the trees after the limitation of the use is void; and then, they remaining parcel of the Freehold, he might have had trespass; but he could not have this Action upon the Case: For as an exception after the Estate limited is void; so after an use setled, an exception cannot be of the trees. Sed non allocatur; For an exception may well be to shew his intent, That they should not be annexed to the estate for life. Secondly, That the Declaration is not good, Because he doth not shew, That he had not left sufficient trees to have the loppings; as in the case of Estovers, The owner of the wood may cut down the wood, leaving sufficient for Estovers. Sed non allocatur; For here all the loppings of all the trees are reserved to the wife, all which she may cut down and sell Moor 837. Moor 7. Co.11.46.b.

ſeil at her pleaſure: So it is a wrong unto her to cut down any. Thirdly, Becauſe it is ſuppoſed, that the Defendant cut down five Oaks growing upon an 100 acres of Land, which is not poſſible that five Oaks ſhould grow upon an 100 acres. Sed non allocatur; For it is to be intended, that they grew upon ſome part of the Farm. Fourthly, Becauſe the Action is brought by the *Baron* and *Feme*, where the *Baron* alone ſhould have brought the Action; for he only might have releaſed the damages; and the wrong is to his poſſeſſion. Sed non allocatur; For the *Baron*, having the Land in right of his wife, he may well joyn her with him in ſuing for the damages; and ſhe ſhall have the damages, and the action alſo, if ſhe ſurvive her husband; wherefore Judgment was given for the Plaintiff.

2 Cr. 110. Ante 419. Poſt. 505.

Tolſon *verſus* Clerk. Trin. 11 Car. rot. 687.

8. ERror of a Judgment in the Common Bench, in Aſſumpſit. The Plaintiff declares, Whereas the Defendant was indebted unto him in ſuch a ſum, That in conſideration the Plaintiff would aliquo tempore forbear him, he promiſed to pay, &c. and alledges, That he forebore for a year or more; And that the Defendant hath not yet paid, &c. After Verdict, upon Non aſſumpſit, and Judgment for the Plaintiff, it was aſſigned for Error by Grimſton (and ſo held to be Error) That aliquo tempore is ſo ſhort a time, that it is no conſideration no more than per paululum tempus: wherefore for this cauſe the Judgment was reverſed.

Ante 242. 2 Cr. 250. 683. 1 Rol. 23.

Brunſdens Caſe.

9. Jones 379. BRunſden was Endicted for Extortion by two ſeveral Endictments. In the one, That he, as Bayliff of the Sheriff of Wiltſhire, had received twenty ſhillings from one extorſivè colore officij ſui: And in the other, That he extorſivè, took ſix ſhillings eight pence. Theſe being preferred againſt him, before the Juſtices of the Peace at Michaelmas Seſſions laſt, in the County of Wilts, and he thereupon committed to Priſon, was enforced (as he pretended) to plead preſently to thoſe Endictments. And the ſame day they were tried, and he convicted, and Judgment againſt him at one and the ſame Seſſions, that he ſhould be impriſoned and fined forty pounds for the one offence; and for the other twenty pounds; and upon every of them treble damages given, viz. for the one three pound and for the other twenty ſix ſhillings eight pence (which was more by ſix ſhillings eight pence than he had received) and to be committed to Priſon until he had paid thoſe fines and damages. And now upon theſe Judgments he brought ſeveral Writs of Error; and by Grimſton it was aſſigned for Error, Firſt, Becauſe the Endictment and the Trial were at one and the ſame Seſſions, whereas they ought not to be tried and traverſed the ſame Seſſions. Secondly, Becauſe they gave damages to the party

Poſt. 448.

party, where they ought not to have given any damages. Vid. 4 H. 5. Enquest 55. & 22 Ed. 4. Coron. 44. That Justices of Gaol-delivery may take enquest the same day; But not so of Justices of Peace, Stanford 155. Postea pag. 448.

The King against the Inhabitants of Epworth, and fifteen other Vills. Mich. 11 Car. rot. 146.

THe King by a Writ out of the Chancery, dated 16 Junij, 11 Caroli, commanded the Sheriff of Lincoln, That he per Sacramentum proborum & legalium hominum Comitatus prædicti diligenter inquirat, qui Malefactores & pacis Regis perturbatores, apud *Epworth*, *Belton*, & *Hackfey* infra Manerium Regis de *Epworth* Sepes, Fossata, & Fensuras ibidem nuper levata noctanter prostraviſſent: Et ponet per vadios, & salvos plegios, quos culpabiles invenerit, ad respondendum in Banco Regis de & super præmissis in *Octabis Michaelis ensuant*; Et quod haberet ibi nomina eorum per quorum Sacramentum, Inquisitionem illam fecerit, et breve illud. And hereupon the Sheriff returned an Enquisition taken 3 Octob. 11 Car. apud Lincoln; whereby it is found, Quod quidam Malefactores et pacis Regis perturbatores primo Maij 10 Car. et diversis diebus et vicibus, inter the said first day of May 10 Car. et primo Junij 11 Car. apud *Epworth*, *Belton*, et *Hackfey* prædicta, infra Manerium Regis de *Epworth* prædict. vi et armis et cum multitudine gentium ignotorum, 700 perticatas fossatorum fensurarum Regis apud *Epworth*, *Belton*, et *Hackfey* prædicta, nuper levat. in noctibus dictorum dierum prostraverunt, ad grave damnum dicti Domini Regis. Sed qui illa fossata et fensuras, vel aliquam partem eorundem sic prostraverunt, Juratores prædicti pœnitus ignorant. Et similiter dicunt, Quod Malefactores prædicti qui malefacta prædicta taliter ut supradictum est fecerunt, cum tali vi et multitudine gentium, & in nocturnis temporibus prædictis commisserunt et perpetraverunt. Ita quod nullus ad eos appropinquare ad ipsos cognoscendos ausus fuit. And upon this return a Writ of Distringas issued out of the Kings Bench, Test. 9 Octob. 11 Car. reciting the said Writ, Return, and Enquisition, commanding the Sheriff to distrain propinquas villatas fossata et fensuras prædicta circumadjacentes fossata et fensuras prædicta prostrat' levare, ad custus suos proprios; and commanding him to enquire per Sacramentum proborum, &c. Quod damnum Rex sustinuit occasione prosternationis prædictarum 700 perticarum fossatorum et fensurarum, et damna illa nobis restituas. And this was returnable crast. *Martini* following; and hereupon the Sheriff returned, Quod Villata de *Epworth*, & fifteen other Villages there named, are the nearest Villages circumadjacent to the foresaid ditches and fences; Et quod Rex sustinuit damna occasione in brevi prædicto specificat. ad 2500 l. Et quod propter brevitatem temporis, non potuit levare damna prædicta de terris et tenementis illis, ita quod dicto Domino Regi restituat; And returned issues upon the Inhabitants of every Village ad. 10. Ante 280.

ad levationem ſoſſatorum & ſenſurarum prædict' ad 20 l. And afterward another Writ of Diſtringas, 28 Nov. 11 Car. iſſued, reciting the firſt Writ and the return thereupon; And the Writ of Diſtringas, and the return thereupon; And that the King is informed, that the ſaid ſoſſata & ſenſuræ nondum levata exiſtunt, and therefore commanded the ſaid Sheriff to diſtrain the ſaid Villages of Epworth, &c. per omnia terras et catalla ſua, &c. Ita quod ipſi ad cuſtus ſuos proprios ſoſſata et ſenſuras prædicta proſtrata levent. Ac nobis prædict' 2500 l. pro damnis prædictis, quæ nos ſuſtinuimus occaſione proſtrationis prædict' 700. perticarum, foſſatorum, et ſenſurarum, reſtituant. And upon this, Rolls moved, That the firſt Writ was not well granted; for it appears by the Writ and Enquiſition, That the proſtration began the firſt day of May 10 Car. and continued till the firſt of June 11 Car. ſo as it was a ſhort time, (viz. but five days) before the Writ brought, which ought not to be; but there ought to be ſo long diſtance as the Country may have a convenient time to enquire, which ought to be a year; and ſo it was held in 12 Jac. Secondly, It doth not appear that this proſtration was of any fences, &c. of the Common, which was improved; for the Statute doth not extend to all Incloſures, but to the throwing down of fences upon improvements of Commons. Thirdly, That the Writ doth not make any mention, That the Malefactors were not endicted. But Sir John Banks the Kings Atturney anſwered to the firſt, That he had ſeen the reſolution in 12 Jac. and it was not, That there ſhould be a year to endict the offendors, but there ought to be a convenient time, and that the Court ſhall adjudge whether the time were convenient. To the ſecond, That the Statute doth not only extend to the proſtration of Incloſures, to be improved out of the Common, but to all Incloſures; and it is for the benefit and peace of the Commonwealth, and ſhall be expounded moſt favourably for the King and the benefit of the Commonwealth: And if it extends only to improvement of Commons, it ought to have been pleaded, that this Incloſure was not any parcel of the Common improved. To the third, That the Defendants ſhould have pleaded, if any of the offendors had been endicted. Et adjournatur. Vide the Statute of Weſt. 2. cap. 46. upon which this writ is grounded.

Ante 281. 2 Inſt. 476. 2 Inſt. 476. Ante 281.

Hilton *verſus* Bembridge. Trin. 11 Car. rot.

11. Jones 376. 1 Ro. 300, &c. 295.

TRespaſs, Quare clauſum fregit. Upon Not guilty a ſpecial Verdict found, the Caſe was, That George Bembridge was Tenant for life, Remainder to Anthony Bembridge in tail; Anthony, by his Deed, granted the Remainder to the Plaintiff in fee; The ſaid George Bembridge being tenant for life, having notice of this Grant, ſaid unto T. H. and J. S. two Strangers, That he was well pleaſed and content that the ſaid Grant was made to the Plaintiff, for he was his Couſin. And that the ſaid George Bembridge was dead, and Anthony Bembridge is yet alive: And if this were a good Atturnment

tornment, they find for the Plaintiff; if not for the Defendant. After argument at the Barr by Widderington for the Plaintiff, and Bulstrod for the Defendant, upon the the first argument, all the Court agréed, that it was an Attornment, although the words were spoken to those who were méer Strangers, and who peradventure had not any notice of the Grant, nor were sent or required by the Grantée to take Attornment, nor required the Tenant to assent, but was a voluntary speech only; for it sufficeth, that the Tenant hath notice of the Grant, and assents thereto. See Bracton fol. 81. And it is for the benefit of the Grantée, who having the Grant, and accepting of that assent, shall be intended to agree thereto in the life of the Tenant for life; because, being a lawful Act, the Law accounts, that he agreed to that Attornment: And it is not necessary to Attourn to the Grantée himself; for all the pleading is, *A quel grant foy attornera*, without mentioning the Attornment to be to the Grantee or any other. And if the Tenant indorse his hand as a witness to the Déed of grant of the Reversion, it is a good Attornment unless he doth not know what was in the Deed; for he ought to have perfect cognisance of the Grant; otherwise it is not a good Attornment. Whereupon, without any further argument, the Attornment was held to be good, and adjudged for the Plaintiff. Vide Cok. Litt. 310. a. & Cok. lib. 2. fol. 69. a. That assent to a Stranger sufficeth. And the Case of 28 H. 8. Attornment 40. That Attornment to a servant was not good, was denyed here to be Law.

Stockman *versus* Hampton. Trin. 11 Car. rot. 752.

TRespas, Quare clausum fregit, and chasing his Cattel. The Defendant justifies, For that Sir Bartholmew Michael was seized in fée, and died seized, which descended to his two daughters and heirs. And he by their command, &c. The Plaintiff replies, That true it is, Sir Bartholmew Michael was seized in fée: But he saith, That being so seized, he, in consideration of the love and affection to Richard Michael his Nepphew, and others of his blood, by Indenture 25. Martii, 15 Jac. covenanted with Edward Rogers and others, to stand seized of those Lands, to the use of himself and the heirs males of his body; and for default of such Issue, To the use of the said Richard Michael for life, Remainder to his first son in tayl, with divers Remainders over in tail, Remainder to the right heirs of the said Sir Bartholmew Michael, whereby, and by virtue of the Statute of Uses, the said Sir Bartholmew Michael was seized in tail, with the Remainders over, and dyed seized of such an Estate, without Issue Male; whereupon the said Richard, entred and the Plaintiff by his licence put in his Cattel &c. and traverseth, That the said Sir Barth. Michael dyed seized in fée. Upon this the Defendant demurrs; and the principal cause was, 12. Jones 377.

Because the Plaintiff claiming by this Deed of uses, which cannot commence without Deed, doth not shew the same. And this being argued divers times at the Barre, All the Court held, That the
2 Cr.217. Plea was good without shewing the Deed, first, Because the Deed doth not belong unto him, although he claims thereby, but to the Covenantees, and he hath not any means to obtain the Deed; and it should be mischievous to those who claim under such a Deed, if they should lose their Estates unless they might produce it. Secondly, Because it is an Estate executed by the Statute of Uses: So the
Ante 209. party is in, by the Law, as Tenant in Dower, and Tenant by Statute Staple, or Merchant, which have a rent charge extended by
2 Cr.109.317. them, as 31 E. 3. *Monstrans de fayts*, 38 & 35 H. 6. ibid. 118. Thirdly, and principally in this Case, Because it is but an inducement to the Travers: And is not answerable by the Defendant; but he ought to maintain his barr, that he dyed seized in fee. Vide 27 H. 8. 2. 21 Ed. 4. 8. Plow. Comment. 64. Whereupon all the Court agreed, that the Replication was good, without shewing the Deed: Wherefore it was adjudged for the Plaintiff. Vid. 14 H. 8. 9. per Pollard, 20 H. 7. 8. per Fineux, Cok. lib. 10. fol. 92. Doct. Leifeilds Case, Coke Lit. 226. 28 H. 8. fol. 29.

Slocombs Case.

13. ERror of a Judgment in Bathe, in an Action for words. Where
1 Rol.774. the Judgment, after the Verdict for the Plaintiff, was given
1 Rol.771. for the Defendant, intending that the Action did not lye for the
2 Cr.386. words. And the entry is, Ideo concessum est, Quod querens nihil
Yelv.130. capiat per billam, which was held a manifest error; for it should
2 Cr.632. have been Ideo consideratum est. Then Germyn for the Plaintiff
Hob.194. in the Writ of Error moved, that Judgment should be given for him upon the Verdict; and that the Declaration is good. And it was agreed by all the Court, If the Declaration and Verdict be good, then Judgment ought to be given for the Plaintiff: whereof Jones doubted at the first, but at last agreed thereto; for we are to give such Judgment as they ought to have given there; so as the Plaintiff shall recover, if the Declaration be good. And Hyde now moved, That the Judgment in the inferiour Court was good for the matter, and that the Declaration was ill: For he there declared: whereas such a suit was depending in the Court of the Guildhall in Excester, shewing what, Et quod seperinde exitus per patriam fuit junctus; and at the tryal the Plaintiff was produced as a witness there, to prove the Issue, and was sworn and gave his evidence upon his Oath, that the Defendant having communication with one Margery Slocomb, of this Tryal and Oath by the Plaintiff, spake these false and scandalous words of the Plaintiff, to the said Margery, Thy Brother (innuendo the Plaintiff, brother of the said Margery) hath taken a false Oath in such a cause (innuendo the said cause.) The Defendant pleaded Not guilty, and found for the Plaintiff.

Plaintiff, and damages and coſts aſſeſſed. The Court upon the matter adjudged, That the Declaration was not good. Hide aſſigned the cauſe to be, becauſe he doth not ſhew how iſſue was joyned; for he ſaith Ad exitum per patriam: And though by implication it is to be intended, that iſſue was well joyned; yet it is not ſo alledged: And then no lawful Tryal, whereto he might be produced as a witneſs. Sed non allocatur; For when it is ſhewn, that at the Tryal he was ſworn, it implies all neceſſary circumſtances, That the iſſue was joyned and the Jury ſworn, and that to the ſaid Jury, upon this iſſue, he gave his evidence. The ſecond exception to the Declaration, Becauſe in the communication alledged with Margery Slocomb, of this Oath at the Tryal, he ſaith, Thy Brother (innuendo the Plaintiff, brother to the ſaid Margery) hath made a falſe Oath, &c. And in all the Declaration it is not averred expreſly, that he was his ſiſter, nor that he was her brother, but after the innuendo; nor is it averred, that he was the ſole brother of the ſaid Margery. And that which comes under or after the innuendo, is not an expreſs averment, nor iſſuable: wherefore the Declaration is not good. And of this opinion was all the Court (abſente Brampſton:) wherefore it was ordered, that a ſpecial entry ſhould be made, that the firſt Judgment ſhould be reverſed for the manner of the entry Ideo conceſſum. But becauſe it appeared to the Court, that the Declaration was inſufficient, it was adjudged here Quod querens nil capiat per billam.

2 Cr. 4.

2 Cr. 107. Ante 177. 2 Cr. 632. Hob. 194. 1 Rol. 774.

Corbett *verſus* Barnes.

A Udita Querela by three, to avoid a Judgment in this Court againſt the ſaid three in Treſpaſs: where one of them was only taken in Execution upon this Judgment, the others not being touched: And therefore Maynard took exception to the Writ and Declaration, Becauſe, he who was in execution ought only to have had the Audita Querela, and the others, who never yet were grieved, ought not to joyn with him: and to prove this, he relyed upon 35 H. 6. 1. Fitzh. N. B. 104. 17 E. 3. 27. Sed non allocatur; For they being parties to the Judgment, and liable to the Execution, although it was never had againſt them, yet for their indempnity may well have an Audita Querela, and joyn with him who is in Execution. Secondly, He excepted againſt the ſurmiſe in the Audita Querela, that it was not good; which was, whereas one J. S. was ſued in the Common Bench for a Battery, ſuppoſed to be done in London, and by Verdict the Plaintiff had Judgment for 30 l. damages and coſts; and the ſaid J. S. was taken in execution for theſe damages and coſts: And afterwards he and the two other Defendants were ſued in this Court for this Battery, ſuppoſed to be done in the County of Hereford, and they three were by Verdict and Judgment condemned in this Court; and it appeared that this Action and the Action in the Common Bench were for one and the

14. Jones 377.

F.N.B. 103. Co. 3. 14. b.

same Battery, and not divers; And that the then Plaintiff had acknowledged satisfaction of the said Judgment to J. S. in the Common Bench, and yet notwithstanding, against Law, had sued to have execution of the said Judgment, where he was satisfied for the same Trespass; and hereupon the Defendant demurred; and now Maynard, for the Defendant in the Audita querela, moved, That this cannot be surmised, because the one Recovery being in London, and the other in the County of Hereford, it cannot be intended to be one and the same Battery. Sed non allocatur; For the Action being transitory, may be layed in what County the Plaintiff will: And it being averred by the Record, to be one and the same Trespass, and not divers, &c. and this being confessed by the Demurrer, the Plaintiffs are not such Strangers to the Record, but that they may have benefit of the satisfaction by the said Record; and because they are all parties to the Act, the Law gives liberty unto every of them, to take advantage of any one of their Acts for the others discharge; as if a release were to one of the Trespassors, and the other had it to plead, they should take advantage thereof, to discharge themselves accordingly; Wherefore it was held, that the surmise was good, and adjudged for the Plaintiffs, unless, &c.

Gryffyth and his Wife *versus* Lewis and his Wife.
Mich. 10 Car. rot. 397.

15. Jones 380. Ante 178. ERror of a Judgment in the grand Sessions in the County of Pembrook, where the Plaintiffs had brought a Quod eis deforciant, and made their protestations prosequi breve illud in forma & natura brevis de quod eis deforciant ad communem legem, secundum formam Statuti de *Rutland*, & petunt Messuagium & Terras in *R.* quæ clamant tenere sibi & hæredibus de corpore ipsius *Mariæ*, ut in jure ipsius, & unde dicunt quod quidam *Thom. Bennet* fuit seisitus in feodo, and gave those Tenements after the Statute of 27 Hen. 8. of Uses: viz. 42 Eliz. to Feoffees, to the use of the said Mary and the heirs of her body, by virtue thereof they entred, and took the Esplees within twenty years last past. Upon this Writ and count, the Tenants demanded Judgment of the writ, because they say the said Writ is a writ formed by the Statute of Westm. 2 Edit. 13 Ed. 1. by which Statute it is provided, Quod quicunq; tale Breve intulerit, debet in brevi suo mentionem facere de Statu quem clamat habere in Tenementis petitis, &c. And in this writ there is not any such mention, Et hoc, &c. whereupon they demanded Judgment of the writ, &c. and the Demandants thereupon demurred; and it was adjudged there That the writ should abate. And now this matter was assigned for Error, and was divers times argued at the Barr, & this Term by Glynn for the Plaintiff in the Writ of Error, and by Beare for the Defendant; And all the Justices, seriatim, delivered their opinions for the Plaintiff in the Writ of Error, that

that this Writ was good; For it is given by the Statute of 12 E. 1. of Rutland, called Statutum Walliæ, where this writ, as here, verbatim, is set down, and there saith, that commune breve quod in aliquo casu tangit jus, et in aliquo casu tangit possessionem: And in the end of the said writ, it is Et similiter conceditur istud breve coram Justiciariis de Banco, si petens voluerit: And although the Statute of Westm. 2. cap. 4. gives an especial writ of Quod ei deforciat in special cases, where the tenant for life, Tenant in dower, or Tenant in tail, and so by equity where Tenant by the Courtesie, lose their Lands by recovery by default; and in such case the writs make mention of their Estates: Yet this being made anno 13 Ed. 1. doth not take away the Statute of Wales, made 12 Ed. 1. which gives the Quod ei deforciat; And this hath been the common practise ever since in Wales, as in 2 Ed. 4. 12. by Needham, who was Justice of Chester, appears: And although in 2 Ed. 4. 11. it is held, that a Quod ei deforciat was not at the Common Law, but was given by the Statute Westm. 2. Berkeley and my self denyed it; for there was a writ of Quod ei deforciat at the Common Law, as appears by 33 Hen. 6. 46. and 10 Hen. 7. 9. by Frowick, and by Bracton, that this writ was given, where one is deforced of Land; and the Book of 2 Ed. 4. is to be intended, that it was not a Quod ei deforciat at the Common Law, where a Recovery was by default against a particular Tenant. For he had not any remedy until the Statute of Westm. 2. and it is only given by the Statute; but in other cases, upon a disseisin or matter in fact, a Quod ei deforciat lies; and the Statute of Rutland proves, That a Quod ei deforciat was at the Common Law: And although this Statute of 13 Ed. 1. comes after the Statute of 12 Ed. 1. which gives the Quod ei deforciat, that doth not take away the Statute of duodecimo Edvardi primi, but that he may have a Quod ei deforciat, and makes his protestation Profequi, in nature of what writ he will; as the Statute of decimo tertio Edwardi primi which gives the *Formdon in descender*, doth not take away the custome of London, that they shall have a Writ patent, and shall make their protestation profequi in natura brevis, *de Formdon in descender & droit close in auncient demeasn*, or make their protestation, profequi, in nature of any other writ that they will. As Fitzh. N. B. and old Book of Entries, fol. 233, & 234. appears. But Jones doubted thereof, whether this writ lies at the Common Law. And although Beare objected, that if this writ be warranted by the custome of Wales, it ought to be shewn in pleading, especially to reverse a Judgment. Yet non allocatur; For the Court here shall take conusance of their Customes and Proceedings, especially being warranted by the Statute of Rutland; wherefore it was adjudged for the Plaintiff in the Writ of Error, that the Judgment should be reversed, and that the Writ should stand, and that the Tenants shall plead thereto the next Term. So note, That for Lands in Wales there may be pleading here.

2 Inst. 358.

2 Inst. 350.

Post. 562.

R. 451.

Moyser

Moyser *versus* Gray, Major of Beverley. Mich. 11 Car. rot. 500.

16. Jones 378. ACtion upon the Case. Whereas the Plaintiff distrained for 7 l. 10 s. rent, reserved upon a Lease made to J. S. And thereupon, the said John at Stile brought a Replevin directed to the said Major, commanding him to accept Pledges of John at Stile the Plaintiff in the Replevin, and to deliver the Cattle according to the 2 Inst. 340. Statute of Westm. 2. That the Defendant delivered the Cattel without finding Pledges. To this the Defendant pleaded, That John at Stile the Plaintiff, in the Replevin, delivered unto him 3 l. 10 s. for pledges, which he accepted, And upon this being demurred, Rolls now for the Plaintiff moved, that it was an ill Plea; For when he is commanded, That if the Plaintiff find Pledges, then he shall deliver, He ought not to take money in lieu of the Pledges; for the Pledges are found, to answer the party, if he hath good cause of Avowry, and to be answerable for the amercement to the King, if he be nonsuited, or it be found against Post. 594. him: And although he might take money for Pledges, yet he ought not to accept of less than the Plaintiff demands. And all the Court held the Plea to be vitious for both causes. For although (as Berkeley said) a Justice of Peace may take money to lie in deposito, for the security of the Peace; and the money shall be forfeited to the King, if he doth not keep the Peace; Yet here it must not be so, because the party is interessed to have the benefit of the Pledges by a Scire facias, if he recover; but he hath not remedy to have the money from the Major, being in his purse, if he should have Judgment to recover. Secondly, The Plea is ill, because it is a lesser sum than what was demanded. But if the Major had taken but one Pledge (if he had been sufficient) it had been well enough; but it is at his peril, if the Pledge be not sufficient, as it is in Cok. lib. 10. fol. 50. Denbawds Case. The Sheriff may take one Surety for appearance to an Arrest, notwithstanding the Statute 23 Hen. 6. wherefore, without further argument, it was adjudged for the Plaintiff.

Girlings Case.

11. Jones 3-8. 2 Rol. 561. 2. 3. FAlse Imprisonment: For Assault, Battery, and Imprisonment for six dayes: The Defendant pleads to all, but to the Assault, Battery, and Imprisonment for six hours Not guilty; And for the Battery and Imprisonment for six hours, he justifies by virtue of a Warrant from the Sheriff of Suff. to arrest him upon a Latitat, who directed his warrant to the Bayliff of.....to execute it, who arrested the Plaintiff, and required the Defendant to be ayding to him, and to keep him; And therefore he detained him for six hours, until the Sheriff discharged him, which is the same Battery and Imprisonment, &c. Upon this Plea the Plaintiff demurrs,

demurrs, and by Keble shews, that the Plea is ill, Because it is not pleaded, that the Writ, being executed, was returned; for the Writ is conditional, Ita quod Habeas Corpus in Court tali die, &c. And therefore if the Sheriff himself would justifie, as here, &c. it is no Plea, without shewing the return of the Writ; and the Sheriffs servant shall not be in a better condition than his Master should be. Sed non allocatur; For true it is, the Sheriff ought to return his Writ, otherwise his justification is not good; but it is not so with his servant, for he hath no means to enforce the Sheriff to make return thereof: And that which he did, was legally done; and it shall not be made illegal by the Sheriffs act, in not returning the Writ. Secondly, It was objected, That this discharge by parol was not good. Sed non allocatur; For the Sheriff may well discharge his servant by parol, that he shall not keep his prisoner any longer; For as he may deliver the prisoner to the Sheriff, without more circumstances; so he may be discharged by his parol, from keeping him any longer; wherefore it was adjudged for the Defendant. 2 Cr 372. 3 Cr. 181.

Wilkinson *versus* Merryland. Trin. 10 Car. rot. 1045.

18. Jones 380. 1 Rol. 415.

Ejectione firmæ. Upon a special Verdict the Case was. One died seized of divers Lands in A. B. and C. in fee, the Lands in C. being in him by way of Mortgage and forfeited, He devised the Lands in A. and B. to several persons and their heirs, and deviseth to divers persons several Legacies, and then adds this clause, All the rest of his Goods, Chattels, Leases, Estates Mortgages, Debts, ready Money, Plate, and other goods whereof he was possest, he devised unto his Wife, after his Debts and Legacies paid, and made his wife Executrix and died. The Wife entred into the Land mortgaged, and devised it to the Defendant and his heirs, and dies: And the Lessor of the Plaintiff, as heir of the Devisor, enters, and makes the Lease to the Plaintiff, and the Defendant actually *ousted* him. The sole question was, whether the fee passed to the Wife by this devise, by the name of All his Estate, Mortgages, &c. And the Court held, that no fee passed unto her: Wherefore Rule was given, that Judgment should be entred for the Plaintiff, unless cause was shewn to the contrary, *&c.* postea pag. 449. Ante. 37. 1 Rol. 415.

Blague *versus* Gold.

19. Jones 379. 1 Rol. 613. 4.

Tresp. Upon a special Verdict it was found, That Peter Blague was seized in fee of two houses in Andover, the one called the corner house, in the tenure of one Binson and Nott, and of another house thereto near adjoyning, in the tenure of Hitchcock, He deviseth his house called the corner house in Andover, in the tenure of Binson and Hitch-cock, to J. S. in fee. Whether the house in the tenure of Hitch-cock, adjoyning to the corner house,

houſe, ſhall paſs or no, was the queſtion? and reſolved, That it ſhall not. But only the corner houſe in the occupation of Binſon and Nott (if they occupie joyntly) ſhall paſs; but if they occupie ſeverally, viz. one part in the Tenure of Binſon, and the other part in the tenure of Nott, ſeverally, then only that in the Tenure of Binſon ſhall paſs, and not the reſidue in the Tenure of Nott; wherefore rule was given, unleſs other cauſe were ſhewn to the contrary, that Judgment ſhould be for the Plaintiff. Vide reſidum poſtea. 473.

Ante 130.

Bumpſteds Caſe, quod vide ante pag. 438.

20. WAs now moved again by Keeling Junior; And he inſiſted upon for Error, that neither Juſtices of Peace, nor Juſtices of *Oyer* and *Terminer*, might enquire and take Travers and determine Endictments the ſame day; But Juſtices in *Eyre* and Gaol delivery might: Becauſe there is warning given long before, of their coming; and the Offendors may know what matters are determinable there: and there is a precept for Jurors to come out of all parts of the County, to try and determine offences before committed, where of the Priſoners may take Cogniſance: And it is for the ſpeedy delivery of the Priſoners. And for this reaſon, compared to the procedings in this Court, which is as the general *Eyre*, as 27 Aſſiſ. 1. where the procedings be for offences committed in the County of Middleſex. This Court is as *Eyre*, to proceed de die in diem, and to award Venire facias returnable the next day, or at another day after, according to their appointment, without regard of fiftéen days betwixt the Teſte and Return: But if any Endictments be removed out of London, or out of the Seſſions of the Peace in Middleſex, by Cerciorari, or out of any other County, where the Defendant is to plead here to the Iſſue, the uſual courſe is to award a Venire facias, and to have fiftéen dayes betwixt the Teſte and Return: A multo fortiori in the Seſſions of the Peace, or before Juſtices of *Oyer* and *Terminer*. And for this point, vid. 4 Hen. 5. Enqueſt. 5. by Hankford, 22 Ed. 4. Coron. 44. 2 Hen. 8. 159. in Kelloway, Stanford 156. And of this opinion was all the Court, That Juſtices of Peace may not enquire, trie, and determine Civil offences in one and the ſame day; For the party ought to have a convenient time to provide for the Trial. The ſecond Error aſſigned, was, That they awarded to the one, treble damages, viz. where he took 20 ſhillings extorſivè, they awarded to the party 3 l. and 40 l. Fine to the King. And upon the other Endictment, where it was found, That he took ſix ſhillings eight pence extorſivè, they awarded; that he ſhould pay to the party for damages 26 s. 8 d. (ſo a quadruple value) and 20 l. Fine to the King, which all the Court clerly held to be erronious: For although, by colour of the Statute of 23 Hen. 6. cap. 10. where treble damages are given to the party, they might aſſeſs them; yet it is here undue and erronious;

Jones 379. 2 Rol. 625. 6. K. 48. 9. Ante 315. 340.

Poſt. 583.

R. 48. 2 Inſt. 568. 4 Inſt. 164. 2 Cr. 404.

nious: For they ought first to have inquired of the damages, for peradventure it may be more or less, according to the circumstances: But they may not assess them themselves, without inquiry by the Jury, for the Jury ought to have found the damages, and then they might treble them. And for the other quadruple damages, it is without colour and out of the Statute: And the Endictment is not contra formam Statuti, as it ought to have been, if they would proceed upon the Statute. Also it is doubtful, whether this Statute extends unto extortions, unless taken upon Arrests: For the Statute doth not speak, but of Arrests, and extortions taken upon them. But the Court resolved not this point: But for the said two former errors the Judgment was reversed.

Bells Case.

BEll was endicted, That he feloniously, octavo Jacobi, stole a silver Ladle of Plate from King James, whereas in truth it was the Plate of Quéen Anne, and stoln from her; for which he obtained his Pardon, by the Quéens means: And now he was endicted again, for stealing the same Plate. And whether he should have the benefit of the general Pardon of vicesimo primo Jacobi, without pleading it and praying a discharge, because there is a special exception in the Pardon of Goods taken away, purloyned, or stoln from the King, was the question? Henden moved, That this exception is to the taking away of Goods, &c. as Trespasser, whereby the property of the Goods is saved to the King, and doth not except the Felony. But the Court doubted hereof; whereupon they advised him to plead, 26 H. 8. 7. 4 H. 7. 8. 21. Dier 85. Ante 32. 2 Cr. 149.

Wilkinson *versus* Merryland. Ante pag. 447.

THe Case was now moved again by Denn, an Apprentice of the Law; and he urged strongly, That an Estate in Fée passed: For in as much as he had disposed divers of his Lands to his brothers and their heirs, and divers personal Legacies to them and to others, but of those Lands in question (being mortgaged to him and his heirs, and forfeited) he had not made any disposing; he devising the residue of all his Goods, Leases, Estates, Mortgages, &c. to his wife, All the Estate which he had in the Mortgage (which is a Fée-simple) passed thereby; For it being in a Will, shall pass according to his intent. As Devise of Land in perpetuum shall pass the Fee: And the Case 19 Eliz. Dy. 357. Devise of the Fee-simple of his house in Soper-lane to his wife, a Fée passed, without the word Heirs, and other Cases to that purpose, To shew that a Fee passed by the intent of the Devisor, without the word Heirs. But Jones and my self continued our former opinion, That no 22. 1 Rol. 834. 5.

fee passed. But the greater question would have been, Whether an Estate for life had passed to the wife, if she had been alive, Because it is coupled only with personal things, as Goods, Leases, Estates, Mortgages, Debts, &c. which may be intended, that he meant only but Estate for years, or Mortgages for years; and so much the rather by reason of the words, whereof I am possessed. And Berkeley (who was absent the day before) concurred in opinion; For the heir shall not be disinherited, nor the fee passed away without an apparent intent out of the words of the Will. And in this case it doth not appear, That he intended to pass, but such things whereof he was possessed, which extend only to things personal, or Leases, whereof he is possessed, and not to freehold, whereof he is said, in Law, to be seized. And peradventure he was not possessed of this Land; For it is not found, That the Mortgagee entred and was in possession: And commonly in Mortgages, the Mortgagor retains the possession until the Mortgagee enters for a forfeiture; wherefore it was appointed, That Judgment should be entred for the Plaintiff. But they agreed, If he had devised all his Estate in such Land; or had mentioned, That he had such Land mortgaged in fee, and devised his Mortgage, the Fee had passed.

Ante 369.

Ante 37.

Cleve *versus* Veer. Trin. 11 Car. rot.

23. Jones 385.

EJectione firmæ of a Lease by Edward Dobbs, of Lands in Dustsborn Abbots, in the County of Gloceſter. Upon Not guilty pleaded, a special Verdict was found, That the said Edward Dobbs was seized in Fee-tail of that Land; and so seized, was bound in a Recognisance, in nature of a Statute Staple, according to the Statute of 23 Hen. 8. acknowledged before Sir Henry Hobert, chief Justice of the Common Bench in 800 l. to William Blythe, That he, the said William Blythe, 21 Jac. made Elizabeth Throgmorton his Executrix, and died primo Julij, primo Caroli; That the said Executrix proved the Will; and for the said 800 l. nono Julij, primo Caroli, sued out of the Chancery an Extendi facias returnable in Chancery Octabis Michaelis: That afterwards, and before the return of the writ, viz. 17 August. primo Caroli, the said Elizabeth the Executrix died: And that 22 Septemb. primo Caroli, the Sheriff, virtute Brevis prædicti cepit inquisitionem, whereby was found, That the said Edward Dobbs was seized in Fee-tail to him and the heirs males of his body, of the said Tenements in question, at the time of the Recognisance, of the annual value of fourteen pounds, four shillings, ten pence, and at the day returned this inquisition into Chancery. They find, That 19 Aug. 1625. which was in primo Caroli, Administration of the Goods of William Blythe, not administred by Elizabeth Throgmorton, who died intestate, were committed to Robert Throgmorton, who, vicesimo secundo Maij, secundo Caroli, obtained a Liberate out of the Chancery to have the said Lands delivered unto him the said Robert

bert Throgmorton Administrator, which was returned, That, secundo Junij secundo Caroli, the Sheriff delivered the said Lands to the said Administrator, tenendum, according to the said Extent; whereby he entred and was seized, prout Lex, &c. And that the said Edward Dobbs entred and let to the Plaintiff, prout in the Declaration, whereby he entred and was possessed, until the Defendant, as Servant to the said Robert Throgmorton, the Administrator, *ousted* him; And if, &c. And upon this special Verdict, it was argued at the Bar by Bulstrod and Rolls, That this Extent and Liberate were void; for the Extent being sued by the Executrix, upon the Statute made to her Testator, and she dying before the Enquisition taken, the Enquisition taken after the death of her, who sued it, was void: for the Writ is to appraise and seize into the hands of the King, ut ei liberari faciamus to the said Executrix; and she being dead before the said Enquisition was taken (so as it cannot be delivered unto her) the Enquisition taken after, and returned, is void. And for this they relyed upon 36 Hen. 6. Bro. tit. Statute Merchant 43. Secondly, it was objected, Admitting this Extent be not void for that cause; yet the Liberate is not well executed, to deliver it to the Administrator; for the Executrix suing it as Executrix to William Blythe the Testator, and she dying intestate, this Writ is sued by the Administrator, who comes *paramount* her, and claiming immediately from the first Intestate, cannot upon this Extent, sued by the Executrix, have the Liberate; but he ought to commence de novo, and procure a new Certificate, and a new Extent and Liberate: And compared it to 26 Hen. 8. 7. and the Case 23 Hen. 8. cited Co. lib. 1. fol. 96. in Shelleys Case. That if an Executor sues a Debtor upon an Obligation made to his Testator, and recovers, and dies intestate, the Administrator of the first man cannot have a Scire facias upon this Judgment, because he comes in *paramount* the Executor who recovered, but he ought to begin de novo. And also compared it to the Cases of a Statute Merchant; where the Conusee procures it to be certified into the Chancery, and a Capias thereunto returnable into the Common Bench (as is usual) or into the Kings Bench; and the Conusor is returned Non est inventus, and after, the Conusee makes his Executor, and dies before the Execution made by Extendi facias, his Executor may not have an Extendi facias, but ought to have a new Certificate out of the Chancery, and a new Capias; as it is Fitzh. N. B. 131. & 2 Eliz. Dyer 180. 17 Ed. 3. 31. 25 Ed. 3. 2. Jones and Berkeley held, That for both causes the Liberate was not well executed, but void. But I held the contrary: Yet to the first, I agreed, That if an Extent be taken in the name of one who is dead, before the Teste of the Writ, it is void, according to the said Book of 36 Hen. 8. But where an Extent is sued and the party who sues it, dies after the Teste of the Writ, and before the Enquisition taken; In that Case the Sheriff ought to inquire what Lands the Conusor had at the time of the Recogni-

Ante 167, 227.

Post. 417.

sance acknowledged, and to make enquiry of the value of them, and to seize into the Kings hands, and return them into Chancery: And the Sheriff is not bound to take notice of the parties death, who sued it; for he is only to execute and return his Writ: But if Execution be sued in the name of one who is dead, before the Teste, it is meerly false and void: And upon this, if the party be taken, he shall have remedy by Audita Querela, or otherwise, as the case requires. Secondly, I held, that the Liberate was well executed at the Suit of the Administrator; For I agreed the Cases, That an Administrator shall not have a Scire facias upon a Judgment obtained by an Executor, because he comes *paramount* that Judgment, and is not privy thereto. And that if a Testator procures a Certificate upon a Statute Merchant, and a Capias is returned into the Common Bench, and the Testator dies after the return, and before the Extendi facias awarded, the Executor must have a new Certificate and a new Capias, and shall not have an Extendi facias upon the Capias returned, because he is another person and in another Court. But upon a Statute Staple, or a Recognisance upon the Statute of 23 Hen. 8. in nature of a Statute Staple, a Certificate being made, and delivered into the hands of the Clerk of the Crown in Chancery, in that case by a Warrant from the Lord Keeper, he shall have an Extendi facias thereupon: For this being executed and returned, is delivered unto the Petty Bag; And although he who procured it be dead, yet being all in one Court, and appearing on Record, it is not the course to have a new Certificate and Extent; but the Executor or Administrator, upon his Oath in Chancery, and shewing of the Testament, or Letters of Administration, shall have a Liberate, without being put to a new Certificate and new Extent, because it is all in one and the same Court. And the Clerk of the Petty Bag said, It is the usual course in Chancery, when there is an Extendi facias upon a Statute Staple, or a Recognisance in nature of a Statute Staple, at the Suit of one, who dies, That the Executor or Administrator, upon his oath, That he who sued it, is dead, is to have a Liberate reciting the former Extent. And of this Brampston doubted: Et adjournatur. Vide residuum postea pag. 457.

Lib. 5. 9. b. Post. 459.

King and his Wife *versus* Fitche. Ante pag. 414.

24. 1 Ro. 786. 7.

ERror of a Judgement in Waste. Babington assigned for Error (which was not any of the Errors assigned in the Record) That Judgment being given by default in a Writ of Waste, made in Domibus, Gardinis, & Pomariis, assigning the waste to be done in the Houses in divers places, and in the Orchard, in cutting down of twenty Apple-trees; And upon the Writ of Enquiry of waste, the waste being found to be in cutting down of two Apple-trees, &c. Et quod nullum aliud fecerunt vastum: That this finding is imperfect. Secondly, Because waste is found in

: Cr. 31.

cutting

cutting down two Apple-trées, and that the Plaintiff ought to be in Misericordia for the residue, which is not so entred, therefore Error: For the Presidents are, That where waste is found in part, Et quod nullum aliud fecerunt vastum; As where waste is assigned in cutting down twenty trées, and the Jury finds, that he cut down but two trées, or less than the Plaintiff assigned, the Plaintiff shall be in Misericordia. Berkeley held, That it is here good enough; For true it is, There is a diversity where the Writ of waste and the Count is in Domibus, Boscis, & Gardinis. And upon the Writ of Enquiry of waste, the waste is found in Domibus et Gardinis, and nothing in Boscis; There the Plaintiff shall be amerced, because he counts for waste in places where no waste was committed in the one of them: But where waste is assigned in cutting down twenty trées, and the waste is found in cutting down two trees, and so varies only in quantity, it is otherwise. But Jones and my self doubted thereof. Vide 14 Ed. 3. Waste 27. 22 Ed. 3. 1. Book Entries 620. Coke 8. fol. 61.

3 Cr. 257.

Hob. 53.

Ante 178.
2 Cr. 630.
Dier 115.
Hob. 53.

Termino

Termino Paſchæ, anno duodecimo *Caroli* Regis, in Banco Regis.

Humphrys *verſus* Knight. Trin. 7 Car. rot. 779.

EJectione firmæ. Upon an eſpecial Verdict, and Not guilty pleaded, the Caſe appeared to be ſuch. Robert Coldham Citizen and Freeman of London, being formerly ſeized in Fee of ſix Meſſuages, in the Pariſh of St. Mary Magdalens, deviſed thoſe Tenements by his will in writing, anno ſexto, Henrici ſeptimi, to the Parſon and Churchwardens of the Pariſh of St. Mary Magdalen, and their Succeſſors, to the intents and purpoſes following, viz. That the Churchwardens of the ſaid Pariſh ſhould receive the profits of the ſaid Tenements; And that ten Marks yearly of the profits ſhould find a Chaplain for ever, to ſing every day at the Altar of the ſaid Church, and to pray for the ſouls of him and his Anceſtors; and to find an Anniverſary there, and to expend thereupon thirteen ſhillings four pence yearly; And the reſidue of the profits thereof, to be imployed about the reparations and Church. And they found the Cuſtoms of London, That the Parſon and Churchwardens are a Corporation, to purchaſe to the uſe of their Church, and that a Freeman and Citizen of London may deviſe Lands in Mortmain: And they further find, That ever ſince the ſaid will, the ſaid ten Marks per annum were imployed accordingly, for the finding of a Chaplain, and the 13 s. 4 d. per annum for the maintenance of an Anniverſary, until the making of the Statute of 1 Ed. 6. And that a quit-rent of 42 s. per annum, was iſſuing out of the ſaid Tenements at the time of the Will and Statute, and paid to the King: And that the Tenements deviſed at the time of the Will, and until the ſaid Statute, were of the annual value of 9 l. 4 s. and no more, yearly; That the Lands were ſeized into the hands of King Edward the ſixth; And by him granted away to J. S. under whom the Defendant claims: And under the Parſon and Churchwardens the Plaintiff claims, as Leſſee. And, whether theſe Tenements were given by the ſaid Statute to the King, was the ſole queſtion? And after arguments at the Bar, it was reſolved, That theſe Lands were given unto the King. For although it was objected by

1 Jones 387.

Ante 248.

Ante 248. Poſt. 517.

by Grimston, That the Land was not given for the maintenance of a Priest, but only a certain sum of 6 l. 13 s. 4 d. yearly; For the Land being appointed for the reparation of the Church, with the residue of the profits thereof, it being a good use, shall save the Land; Yet the Court held, That for as much as it was but the residue, si quid fuerit; which is incertain, if any shall be or no. And it appears by the Verdict, That the Land was charged with a quit-rent of 42 s. yearly, and the superstitious uses amounted to 7 l. 6 s. 8 d. And that at the time of the Will and until the Statute, the Land was valued but at 9 l. 4 s. yearly, and no more; and, That the profits imployed with the quit-rent, appeared to amount to 9 l. 8 s. 8 d. which was 4 s. 8 d. more than the Land yearly yielded, and so no residue: Therefore to be within the words and intent of the Statute, that is to say, the first and third branch; and, That the principal cause of this gift, is the maintaining of a Priest and an Anniversary, and wherewith and whereby a Priest and an Anniversary were maintained. See for this Cok. lib. 4. fol. 110. & 112. in Adams and Lamberts Case. And although it hath been objected, There may be improvement expected of the houses, there being six houses; it was thereto answered, That is not to be intended; For the value is to be regarded, as it was at the time of the Will making, at least as it was at the time of the making of the Statute of 1 Ed. 6. and a greater value shall not be expected; and if it were of a greater value after, it is not considerable; for it is to be respected as it was at the time of the Statute made, as 6 Ed. 2. Voucher 258. 19 H. 6. 46. Vouchee shall not render in value more than it was at the time of the warranty; and the value of the Land is to be respected as it is ultra Reprisas. And a Case betwixt Drake and Hill, adjudged 8 Car. in the Common Bench, was cited, That the 8 l. value of a Church shall be according as it is valued in the valuation of the Benefices, and not according to the true value, as it is upon improvement, although diversity of opinions have been therein before, For the Statute intends as it was valued in the ancient book of First-fruits and Tenths, which was tared 29 Ed. 1. And after, when another valuation was made, 26 H. 8. then according to that valuation. Wherefore this Land being charged with a quit-rent of 42 s. the residue not amounting to the value appointed for the superstitious uses, It was adjudged for the Defendant. Vid. 43 Ed. 3. 8. 27 Ed. 3. 1. 7 H. 3. Dower 192.

Pew and his Wife *versus* Jeffryes.

2. 2 Rol. 297. QUit being in the Spiritual Court, for calling the wife Welsh Jade and Welsh Rogue, Sentence being there in the Arch's, The Defendant appealed to the Court of Audience; and in the Appeal mentioned the former words; and in the Libel was interlined, And a Welsh Thief: And hereupon a Prohibition was prayed and granted

granted, unleſs cauſe were ſhewn by ſuch a day to the contrary: for it was held clearly, That for the word Welſh Thief Action lies at the Common Law, and they ought not to ſue in the Spiritual Court: And for the other words, It was conceived upon the firſt motion, They ought not to ſue in the Spiritual Court; for they be words only of heat, and no ſlander. But it was afterward moved and ſhewn, That the ſaid words, A Welſh Thief were not in the firſt Libel, nor in the Appeal at the time of the Appeal, but were interlined by a falſe hand, without the privity of the Plaintiff, in the Spiritual Court; and that upon examination in the Spiritual Court, It was found to be falſly inſerted and ordered to be expunged. And that the words Welſh Jade, were ſhewn in the Libel to be expounded, and ſo known to be a Welſh Whore; Ante 394. which being a ſpiritual cauſe and examinable there, it was therefore prayed, That no Prohibition ſhould be granted: And if a Prohibition was iſſued forth, that a Conſultation might be awarded; And the Court was of that opinion, for the words, And a Welſh R. 765. 177. Thief, being unduly interlined, and by authority of the Spiritual Court expunged, and in the Spiritual Court, Jade being known, and ſo expounded for an Whore; and eſpecially being after two Sentences in the Spiritual Court, That the Common Law ought not to intermeddle therewith: Wherefore Conſultation was granted, if any Prohibition was iſſued forth Quia improvide; And Rule given, That if a Prohibition was not paſſed, that none ſhould be.

Cleve *verſus* Veer. Cujus principium, pag. 450.

WAs now moved again, abſente Brampſton. And Jones and Berkeley argued, That this Extent made after the death of the Conuſee was meerly void: for by the Conuſees death (as Berkeley ſaid) the writ of Extent is abated in facto, And that the Sheriff hath not any authority to extend the Lands: for the writ is, That he ſhall extend and ſeize into the Kings hands ut ei liberemus; And when he is dead, there is not any warrant to deliver them to his Executor or Adminiſtrator; for it is particular ut ei liberemus, and he is not to deliver it to any other, And compared it to the Caſes 25 Ed. 3. 2. 18 Ed. 3. 10. & 26 Eliz. Dy. 180. That if a Conuſee of a Statute Marchant procures a Certificate upon the Statute, and thereupon a Capias, returnable in the Common Bench or Kings Bench, And the Capias being returned Non eſt inventus, and the Conuſee dies before another Execution is Ante 451. awarded, The Executors might not have Execution, but were directed to bring a new Certificate and a new Capias out of the Chancery. Secondly, Berkeley held, That if the Extent had been well returned, yet the Adminiſtrator coming *paramount*, the Executor cannot have the benefit thereof, as 29 Hen. 6. 7. And Jones was

1 Ro. 786. 304. 5. 2 Rol. 467.

of the ſame opinion, and cited the Caſe betwixt Beamond and Long in this Court; Quod vid. ante pag. 208. & 227. Alſo Berkeley ſaid, That as the Verdict is found, the Plaintiff ought not to have Judgment; For it is an Ejectione firmæ of the capital Meſſuage, Sive ſitum Manerij de *B.* and one hundred and twenty acres of Land, one hundred of Paſture, &c. in B. which Declaration is not good for the Meſſuage, becauſe it is in the diſjunctive, but it is good for the Land, and there is no title found for the Defendant for the Land. For the Verdict finds, That the ſaid Edward Dobbs, the Leſſor and the Conuſor, was ſeized in tail of the Manor of B. at the time of the Recogniſance; And that this Manor was delivered in extent; but he doth not ſay, That the Land in the Declaration was parcel of the ſaid Manor; And ſo it is not found. That this Land was delivered in Extent, and then the Defendant hath no title.

3 Cr. 828. But Jones agreed with me, That this is not material; For being in an eſpecial Verdict, it is intended, otherwiſe there would be no

Ante 22, 130, 392. cauſe of a ſpecial Verdict. See for this point Coke 5. fol. 97. a.

2 Cr. 175. Goodales Caſe. So for the matter Jones and Berkeley agreed, That Judgment ſhould be given for the Plaintiff: But I argued to the contrary, becauſe this Extent upon the Statute is in nature of a Statute Staple, Where all the proceedings are in Chancery, and not like to Executions upon Statutes Merchants, Where the beginning is upon a Certificate made in the Chancery, and a Capias is awarded retournable in the Common Bench, or Kings Bench; For there peradventure, as the Caſe is 18 Ed. 3. 10. & Dyer 180. Where the Conuſee dies before Execution, the Executor ſhall not proceed in the Execution, upon Non eſt inventus returned, without a new Writ out of the Chancery, becauſe it is their warrant to proceed in the Common Bench; but an Extent upon a Statute Staple, and the proceedings thereupon, are all in the Chancery; And then, although the Conuſee dies betwixt the Writ of Extent, and the return thereof; yet being but a preparation unto the Execution upon his Cogniſance, what Lands are extendable and the value of them, and to ſeize them into the Kings hands, ut ei liberemus, none hath anſwered to it; And it being returned there, it is in vain to have a new Enquiſition, it being all of Record in the ſame Court. Secondly, Although the Conuſee dies before the return of the Writ, there being a good Enquiſition, it is well enough; And although it be an Enquiſition after the death of the Conuſee, yet it is good enough; For the Sheriff did that which the Writ enjoyned him, viz. to enquire what Lands the Recognizor had at the time of the Recogniſance acknowledged, or after, of what annual value, and to ſeize them into the Kings hands, ut ei liberemus, That is only to ſhew the Kings intent; and the ſeizure into the Kings hands, makes not any Title to the King, nor puts the poſſeſſion in him, but is only matter of form; As it is in 3 Ed. 6. fol. 67. Although an Enquiſition be after the death of the Conuſee, yet it is as good as if it had been in his life; For the Sheriff may not take notice

of

of the death of the Conusee, but he ought to return how he served the writ; And if he return that the Conusee is dead, he shall be amerced, as 10 Hen. 4. 5. & 7. & 32 H. 6. 28. are: And there is a difference betwixt a Judicial writ, after Judgment to do execution, and a writ Original; For the writ Judicial, to make execution, shall not abate, nor is abateable by the death of him who sues it; as it is the common course, if a Capias ad satisfaciendum, or a Fieri facias upon Judgment issueth, the Sheriff shall execute it, although the party who sued it died before the return of the writ, and although the death be before or after the Execution, if it be after the Teste of the writ, it is well enough. As where a Capias ad satisfaciendum is sued, and the party taken before or after the death of him who sued it, and before the day of the return; or if a Fieri facias be awarded, and the money levied by the Sheriff, and the Plaintiff dies before the day of the return of the writ, yet the Executor or his Administrator shall have the benefit, and is to have the money: And it is no return for the Sheriff to say that the Plaintiff is dead, and therefore he did not execute it. And for the second point I argued, because it is not a Suit by way of Action, as a Scire facias, or Debt, which I agreed, The Administrator shall not have, upon a Judgment obtained by the Executor, because he comes *paramount* the Executor. Vid. Cok. lib. 1. fol. 96. & lib. 5. fol. 9. Brudnels Case. Yet this being no Suit, but the praying of a Liberate upon the shewing of the Letters of Administration, the Administrator may well have it; and he is the party who hath the privity to demand it, for the benefit of the Intestate: And if the Executor had had the extent well executed, and the Liberate thereupon well delivered, and were in possession thereof, and died intestate, The Administrator of the first man, in whose right the Extent was sued, should have it, as Jones agreed afterwards in his Argument: So where it is only to demand delivery, he may do it well enough. But notwithstanding these reasons, Jones and Berkeley appointed, (Bramston chief Justice being in the Court of Wards) That Judgment should be entred for the Plaintiff: For Jones said, That Brampston delivered unto him his opinion for the Plaintiff; because the extent taken after the death of the Conusee, although it was returned in the Chancery at the day of the return of the writ, was meerly void; and so the Defendant had not any Title thereby; wherefore Judgment was entred accordingly for the Plaintiff. Ante 451, 2.

Webb *versus* Nicholls.

ERror of a Judgment in the Common Bench, in an Action upon the Case, for words. Where Nicholls declared that he was an Attorny in the Common Bench, and so had been for fifteen years; and whereas one Humphry Stile had retained him for his Attorney, to prosecute a Suit against J. D. That Webb, præmissorum non 4. 1 Ro. 52.

ignarus, intending to ſcandalize him in his Profeſſion, and to diſſwade others from retaining him, having Communication with the ſaid Humphry Style, falſly and maliciouſly ſaid of him, the ſaid Nicholls, theſe words, I marvail you will imploy ſuch a Knave as *Nicholls* (innuendo the Plaintiff) You will have but diſgrace and diſcredit by imploying him. He (innuendo the Plaintiff) is a proclaimed Knave in the Market. Quorum præmiſſorum prætextu, he was much prejudiced in his Profeſſion, many of his Clients withdrawing from him, &c. The Defendant pleads Not guilty, and found againſt him, and damages aſſeſt to 200 l. and upon this Judgment Error brought and aſſigned, becauſe the words were not actionable; For he doth not ſay, That the communication was with the ſaid Humphry Stile of the ſaid Suit, nor is it ſhewn, That the words were ſpoken of the imployment in his Profeſſion; and therefore Heath Serjeant moved, That an action lies not for theſe words; For to call an Attorney Knave is but a word of heat, and a word for which no Action lies; and to ſay, He is a proclaimed Knave in the Market, is but an aggravation of the word Knave. And this Caſe differs from Bychleys Caſe, Cok. 4. fol. 16. For there he ſaith of him being an Attorney, You are known to be a corrupt man, and to deal corruptly; ſo as thoſe words cannot have any other expoſition then as touching his Office of Attorney: But it is not ſo here, &c. But all the Court held, That the Action well lies; For it is not intendable, but that he ſpake of him as an evil dealer in his Profeſſion; for he ſpeaking with him, who uſed the ſaid Plaintiff in a Suit, and ſpeaking to him the words, ut ſupra, they have relation to his Profeſſion, and cannot have other intendment, eſpecially the Plaintiff alledging, That he ſpake them to ſcandalize him in his Profeſſion; and the Defendant pleading Not guilty thereunto, and being found guilty, according as the Plaintiff hath counted; wherefore the judgment was affirmed.

Poſt. 516. Ante 192.

5. MEmorandum, That upon Saturday before the end of the Term, the King cauſed his Proclamation to be publiſhed the ſame day in Chancery, That in regard of the increaſing of the Peſtilence in *London*, and the places thereto adjoyning, and the danger it might diſperſe into the Country, he reſolved to adjourn the Term from *Octab. Trin.* until *Tres Trin.* And that the ſaid returns ſhould be only for furtherance of the ordinary Proceedings; And that no Proceedings ſhould be upon Demurrers or ſpecial Verdicts, nor any Hearings in the Star-chamber, or in any of the Courts of Equity.

Stone *verſus* Newman. Ante pag. 427.

6. THis Caſe was now moved again upon exceptions to the pleading, Firſt, Becauſe there is not any ſeiſin alledged in the Queen, And then Sir Francis Wiatts title is good, until ſeiſin; for he

Ante 431.

he had the first possession. Sed non allocatur; For it appears, That after the Attainder, the Queen being intituled by the general Act of Parliament, of 33 H. 8. and by the special Act of primo Mariæ, of the Attainder of Sir Thomas Wyatt, it was in the Queen without office; and that the Queen granted it by Patent unto him, under whom the Plaintiff claims, who entred, and was seized untill Sir Francis Wiatt entred and distrained for damage feasant; so he had the priority of possession and right (as it was now held by the greater opinion;) wherefore this exception was disallowed. The second exception was, That the Endictment was by virtue of a Commission granted to divers persons; And he doth not say Sub magno Sigillo *Angliæ*, And that the Attainder was upon the Trial before the Commissioners, and he doth not say, sub magno Sigillo; so as if it were not sub magno Sigillo, it is not good. And in proof thereof, the pleading in the Common Bench in Moultons Case was remembred, That the Commission was sub magno Sigillo; And in Huntleys Case, in this Court, Because the deprivation was found before the Commissioners Ecclesiastical, virtute Commissionis to them directed; and he doth not say sub magno Sigillo, it was held to be ill; and Cok. lib. 5. fol. 51. Letters Patents were pleaded sub magno Sigillo. And although it be true, That in Plowd. Comment. in Walsinghams Case, it is pleaded as here, and doth not say sub magno Sigillo, and yet Judgment given; It was said, That was because no exception was taken thereto. And in Cok. lib. Entr. fol. 174. the Commission is pleaded by Letters Patents sub magno Sigillo, and an Attainder by virtue thereof, & ibid. 194. in the Case of Sir Moyle Fynch, it was so likewise pleaded: So generally the pleading is sub magno Sigillo: Otherwise it is ill, and as no Attainder pleaded. And of that opinion was Jones at the first; but afterward, upon search of Presidents, whereby it appeared, that sometimes sub magno Sigillo was omitted; and when it is shewn, Quod per literas Patentes Commissionis (omitting sub magno Sigillo) It is to be intended under the great Seal, and not otherwise. All the Court agreed, That although it were the better course to shew, that it was sub magno Sigillo, yet being omitted, it is well enough; and good both ways: And they agreed, That here, according to the greater opinion in the Exchequer Chamber, Judgment should be entred for the Plaintiff. R. 766. Abte 181.

Porters Case.

UPon the Statute of primo Jac. cap. 11. ..... Porter was endicted, For that she being lawfully married to ..... Porter, and he then living and she well knowing thereof, felonicè espoused one Rooks, contra formam Statuti. Upon Not guilty pleaded a special Verdict was found, That she was lawfully espoused to the said Porter; And that before Sir John Lamb, Judge of the Court of Audience, she had sued a Divorce from the said Porter propter 7.

propter ſævitiam: Where, upon proſecution, it was decreed, Quod propter ſævitiam of her ſaid husband towards her, ſhe ſhould be ſeparated à Menſa & Thoro from her ſaid husband; but no word of divorciamus was therein: And it was expreſly intimated in the Sentence, That ſhe ſhould not marry to any other during the life of the ſaid Porter. And this Sentence was found in hæc verba. And that afterwards, within ſix months, the ſaid Porter living and ſhe knowing thereof, eſpouſed the ſaid Rooks. And if ſhe be guilty of the felonious marrying of a ſecond husband, againſt the form of the Statute, they prayed the Diſcretion of the Court? And it was argued at the Bar by Germin, for the King, That it is felony within the Statute; for ſhe is directly within the words of the body of the Act, She being married to one man and he being alive, and ſhe (knowing thereof) marrying to another. And the Proviſo ſhall not aid her; For that doth not extend but only to perſons which are divorced by Sentence in the Spiritual Court; but here is not any Sentence of Divorce, but only a ſeparation from her husband à Menſa & Thoro, which is only a liberty to live from him, and a proviſion only for her ſafety, That ſhe ſhall not live with him, to avoid his miſuſing of her by his cruelty: And there is not one word of divorciamus in the Sentence, as there is in every caſe of Divorce; therefore ſhe is out of the Proviſo. And this is none of the Divorces mentioned 47 Ed. 3. folio ultimo; where it is found, that there be but five Divorces, viz. cauſa Profeſſionis, cauſa Præcontractus, cauſa Conſanguinitatis, cauſa Affinitatis, & cauſa Frigiditatis: And this Divorce is none of them; And the Proviſo doth not intend, but when there is Sentence of an abſolute Divorce. But Holbourn and Grimſton, for the Defendant, argued ſtrongly to the contrary; For it is a penal Law concerning life, and therefore ought to be favourably expounded in favorem vitæ, and that the Proviſo extends to this kind of Divorce; for there be Divorces ex cauſa precedente: As in the Caſes of Divorces cited, which be not properly Divorces, but rather Sentences of nullifying the Marriage, which is not intended in the Proviſo; for ſuch a Marriage was void of it ſelf: And by the Sentence declaration is made That it was void ab initio: And ſo it is where Marriage is infra annos nubiles; and ſuch Divorces are declared Null, & by ſuch Divorce the parties are freed à vinculo Matrimonij. But there be Divorces ex cauſa ſubſequente, as cauſa Adulterij, which, in the intention of ſome, is an abſolute Divorce, and that the party innocent might marry again: But others conceive, That it is no abſolute Divorce, but only a ſeparation à Menſa & Thoro, and frees the parties from the performance of conjugal duties only, the one with the other. For although in former times, it was queſtioned, whether ſuch parties divorced might marry again, yet now it is made clear by the Canons, that they may not. And to avoid this queſtion principally, This Proviſo was added in the Statute, That where Sentence of Divorce is given, ſuch perſons marrying ſhall not be in danger.

ger to be Felons by this Statute. By the same reason in this Case there being a sentence of Divorce, although it doth not dissolve parties à vinculo Matrimonij; yet an ignorant woman cannot know that distinction, But they conceive when there is a sentence of Divorce, that they are out of the Statute. And although there be no such word as divorciamus in the sentence, yet there is separamus; And the word divorciamus is not usual, but separamus. And Cok. Lit. 235. shews what Divorces be à vinculo Matrimonij, which are the Divorces before cited in 47 Ed. 3. 27. which are causes precedent the Marriage; And by such Divorces the Issue is made a Bastard, and thereby declared, That they were not justæ Nuptiæ. But Divorce causa Adulterij, is no dissolution à vinculo; but only à Mensa & Thoro; and therefore the Coverture continues betwixt them. And to that purpose a Case was cited Pasch. 44 Eliz. rot. 292. betwixt Stevens and Where the husband, after such Divorce causa Adulterij, released an Obligation made to his wife before the Coverture, And it was adjudged a good release; which proves, That the Marriage continues. And another Case, Trin. 2 Jac. rot. 815. one Stowels Case, That the wife, after such Divorce, should have Dower of her Husbands Land, which proves, That the Espousals continue betwixt them. But a Divorce causa sævitiæ, is grounded ex jure Naturæ, and is in the same manner and nature as a Divorce causa Adulterij: And the Proviso in the Statute is, That the parties divorced by sentence, if he takes another wife, or the wife takes another husband, shall not be within the danger of the Statute. And this extends to every manner of sentence of Divorce, and not to any particular cause of Divorce: And so concluded, That she is within the Proviso of the said Statute, and so Not guilty of the felony. But the Court much doubted whether she were within that Proviso: And if this should be suffered, many would be divorced upon such pretence, and instantly marry again, whereby many inconveniencies would ensue. Whereupon she was advised, not to insist upon the Law, but to procure a Pardon to avoid the danger: For it was clerly agreed by all the Civilians and others, That this second Marriage was unlawful, and that she might be in danger to be adjudged a Felon by this Statute. 3 Inst. 89. This is said to be no Felony.

3 Cr. 908. Moor 665. Noy 45.

Godb. 145. Noy 108.

Co. Lit. 235. a.

3 Inst. 89.

Termino

Termino Trinitatis, anno duodecimo *Caroli* Regis, in Banco Regis.

Anonymus.

1. SCire facias. Upon a Judgment given in Debt for *Baron* and *Feme*, as Administratrix to her first husband, the *Feme* being dead after Judgment, and before Execution, the *Baron* brought a Scire facias, and upon the Scire feci returned, obtained a Judgment by Nihil dicit; and this being a Judgment of the last Term, Rolls now moved to stay Execution; For the Debt being due to the *Feme* as Administratrix, although the Recovery be by the *Baron* and *Feme*, she being dead, the *Baron* may not have Execution upon this Judgment: For the Debt was due to the *Feme* in *Auter Droit*: And of this opinion was all the Court, That the Scire facias ought not to be brought by the *Baron*, but being sued, and Judgment obtained thereupon the last Term; although the Judgment be erroneous, yet it ought to stand until it be reversed by Error. But whether he may have a Writ of Error in the Exchequer Chamber, Tam in Redditione Judicij, quam in Redditione Executionis, Jones and Berkeley doubted; For upon a Judgment in a Scire facias in this Court, there lies no Writ of Error in the Exchequer Chamber. But I held, for as much as this Scire facias is but to have Execution grounded upon a former Judgment, That it is within the Statute of 37 Eliz. and that a Writ of Error lies in the Exchequer Chamber to reverse the Judgment and the Execution: And although there be no Error upon the Judgment, but that it be affirmed, yet the Execution may be reversed: But Brampston chief Justice doubted thereof; Ideo Curia advisare vult.

Co. Lit. 351. a. b
Jones 386. 248
Ante 217.
1 Rol. 889.

3 Cr. 730.
Ante 286.
1 Vent. 160.

Cholmleys Case.

2. INdictment, against Jasper Cholmley and John Cholmley of Hoxton, in the County of Middlesex Gent. For that they Insultum fecerunt upon John Higham Doctor of Physick, in Ecclesia de *Shoreditch* prædicta; Et prædict. *Joh. Higham*, ad tunc & ibidem, in Ecclesia de *Shoreditch* prædict. verberaverunt, vulneraverunt, et malè tractaverunt contra formam Statuti, &c. Upon this the grand Jury find Billa vera quoad Jasper Cholmley, and Ignoramus for John Cholmley; And hereupon he appeared, and pleaded Not guilty, and found against him. Rolls now moved in an Arrest of Judgment, That the Endictment was not good, being Fecerunt, whereas

whereas it is found only Billa vera against one. Sed non allocatur; Because it was exhibited against two, and it is but false Latine. Secondly, Because the Endictment is contra formam Statuti, and this offence is not punishable by the Statute, unless that he smote with a weapon, or drew a weapon in the Church, or Church-yard, or drew a weapon to that intent, which is not mentioned in the Endictment: And by the second Clause in the Statute, for smiting or laying violent hands, it is excommunication ipso facto; and it is not mentioned here how he stroke, and thereof the Justices doubted. But Jones said, That the Endictment was good for Battery at the Common Law. But all the other Justices were against him therein; for the Endictment concluding contra formam Statuti, it cannot be good, as for an offence at the Common Law. But afterwards another exception was taken by Grimston, Because the offence was alledged to be done in the Church of Shoreditch aforesaid, and Shoreditch was not named before: And upon view of the Endictment, it appearing to be so, all the Court held, That the Endictment was void: And for this cause the Judgment was stayed. Post. 504.

Mary Smiths Case.

MAry Smith and others were Endicted upon the Statute of 4 & 5 Ph. & Mar. cap. 8. in the County of Midd. before the Justices of the Kings Bench; Because they took and conveyed away Francis the Daughter of Scipio Squire being under the age of sixteen years unmarried, and in the custody, and under the government of her said father, without his consent et contra formam dicti Statuti: And upon this, Mary Smith pleaded Not guilty, and was found guilty: And it was moved in arrest of Judgment, That the Endictment in this Court was not good: Being Coram non Judice; Because the Statute appoints: That for this offence the party offending shall be punisht by two years imprisonment, or shall pay such a fine as the Starchamber shall appoint. And the words in the Statute are, That the Counsel in the Starchamber, and the Justices of Assise by Inquisition or Endictment, shall have power to hear and determin, &c. And whether this may extend to Justices of the Kings Bench, to give them authority to inquire, was the question, Or only to Justices of Assise? And whether Justices of the Kings Bench be not Justices of Assise? But of this the Court doubted. Because there be no Justices of Assise for the County of Midd. The second question was, Admitting they may hear and determine, Whether they may impose any fine, or only give Judgment for the imprisonment; Because the fine is appointed to be assessed in the Starchamber, and in no other place? Quære. 3 Inst. 62.

4. MEmorandum, That in regard of the increasing of the Pestilence in *London*,& the places adjoyning,the King according to his Proclamation formerly made,directed his Writs of adjournment to the Kings Bench,Common Bench, and the Exchequer, to adjourn theTerm from*Octabis Trinitatis* unto*Tres Trinitatis*. And upon the same day of *Octabis* all the Courts sat untill eleven of the Clock in the forenoon,and heard motions concerning matters in arrest of judgment,and pleadings, and Endictments, and Writs of Error; where it appeared, That the Writs of Error were brought for delays of Execution, and no colour of Error: But no Judgments in any Demurrer, or matter in Law upon special Verdict, unless it were in Cases which were moved the last Term;and rule given,that if cause were not shewn the first or second day of this Term, Judgment should be entred for the Plaintiff or Defendant,as the case required. There, upon motion, although it were upon Demurrer, or special Verdict,no cause being shewn to the contrary,the Court gave Judgment according to the former rule: And so Justice *Hutton* said they did in the Common Bench. And afterward upon the same day
Hutt.129. *Brampston* chief Justice published,that whereas the Prisoners of the Kings Bench and Fleet had several times petitioned the King, for avoiding the danger of the infection of the Plague much increasing, That they who could give sufficient security to theMarshal or to the Warden of the Fleet,to be true Prisoners, and to return to Prison at the days to them prescribed,might go at large by *Habeas Corpus* for that time(as they pretended was the antient course in former times upon the like cases.) And all the Justices and Barons of the Exchequer,besides the Lord *Finch* chief Justice of the Common Bench, & Baron *Denham*(who were not in Town)being assembled at theLord Keepers house, to consult of this matter,and what course was to be taken for the safeguard of the Prisoners, upon conference with the Lord keeper, resolved, That an *Habeas Corpus* was an ancient and legal Writ; but under colour thereof, the Warden of the
1 Rol.808. Fleet, and Marshal of the Kings Bench ought not to suffer Prisoners to go at large,but that such permission is an abuse of the said Writ, and an escape in the Keeper of the Prison: But for the safeguard of the Prisoners (who might if they would provide for themselves by payment of their debts,and be discharged) the Warden of the Fleet, by rule or licence of the Courts to which they are subject, and the Marshalof the Kings Bench, by rule from the Kings Bench, may
Ant.210. keep theirPrisoners in any other place in theCountry,to be assigned
Hob.202. by the Courts unto them: But there they ought to be kept as prisoners,*sub salva & arcta custod.*as they ought to be in their properPrisons. And this resolution was delivered unto the King under all their hands; & theKing signified his pleasure, that he very well approved thereof,& commanded,that it should beobserved. And itwas remembred,that
Ant.14. *in primo Caroli*,when theTerm was at *Reading*,such resolutions were by all the Justices. And afterward, about eleven of the Clock the same day,the writ of Adjournment was opened, & openly

ly read; and the Term was adjourned untill *Tres Trinitatis*. *Note*, That neither Chancery, the Exchequer Chamber, nor the Dutchy Court did sit all this Term.

Stone *versus* Lingar, and others.

ACtion upon the Case. Whereas the Plaintiffs were Inhabitants, and possessed of such Lands for years in the Parish of St. Martins, and were there liable to the payment of all duties for the Reparation of the Church of the said Parish, and to all rates and charges within the same. That the Defendant being Constable of Roxborogh, falsly presented, That they were Inhabitants in the Parish of Roxborogh, and possessed of the said Lands in the Parish of Roxborogh, and chargeable there to the payment of such duties; by reason whereof, they were compelled to pay such sums unduely; for which they brought this Action. Upon Not guilty pleaded, the Defendant was found not guilty. And Grimston moved for the Defendant to have double costs, because what he did, was by virtue of his Office; and by the Statute of 7 Jac. cap. 5. he ought to have double costs. But on the other side it was moved by Atkins That this being a special Action upon the Case for false Presentment (and not an Action of Trespass or false Imprisonment) wherein liberty is given to plead Not guilty, and give the special matter in evidence. And the question being, In what Parish the said Lands were? That it was out of that Statute, but within the Statute of 23 Hen. 8. which gives single costs to the Defendant. And of this opinion was all the Court, and gave rule accordingly. 5.

Termino Paschæ, anno decimo tertio *Caroli* Regis, in Banco Regis.

Humphrys *versus* Stanfeild.

ACtion for words. Whereas the Plaintiff being Son and Heir apparent to John his Father, who was possest of goods to the value of 200 l. and seized of Lands to the value of 40 l. per annum; and whereas William Humphrys, his Uncle, was seized in fee of Lands of the value of 40 l. per annum, and he the Plaintiff was in likelyhood to be his Heir: That the Defendant, to disgrace the Plaintiff, and to make others have an ill opinion of him, said maliciously and falsly of the Plaintiff, Thou art a Bastard. Upon Not guilty pleaded, and found for the Plaintiff, and damages assest to 40 l. Maynard moved in arrest of Judgment, that these words be not actionable, Because he doth not shew any particular damage. But all the Court held, that the Action lies; for by reason of these words he may be in disgrace with his Father and Uncle, and they conceiving a jealousie of him touching the same, 'tis possible they may disinherit him; and although they do not, yet the Action lies for the damages which may ensue. And Jones cited That in the Exchequer Vaughan brought an Action against Ellis surmising, That Land was given to the Plaintiffs Grandfather, and to the Heirs Males of his body; And that he had Issue the Plaintiffs Father, who had Issue the Plaintiff and divers other Sons then living, who by possibility might be heir to that Intail: That the Defendant said of him, Thou art a Bastard, whereupon he brought his Action, and it was adjudged maintainable, and this Judgment affirmed in a Writ of Error. And another Case was cited to be so resolved in this Court, betwixt Banister and Banister. And of this opinion was all the Court; Wherefore rule was given, That Judgment should be entred for the Plaintiff, unless, &c.

1. Jones 388. Godb. ult. 1 Rol. 38.

2 Cr. 213.

R. 665. Jones 388.

William

William Slaters Case.

2. WIlliam Slater was, by Elizabeth Eaton, charged with the getting of a Bastard Child on her body. The two next Justices did not make any Order in it, according to the Statute of 18 Eliz. but the Cause came first to be originally heard at the general Sessions of the Peace at Spaulding in the County of Lincoln, 13. Jul. 8 Car. where the Justices ordered, That whereas it was proved by witnesses, that one Alexander Leigh had often used private company with the said Elizabeth Eaton, and had confessed that he had done as much to her as a man could do to a woman; And that she had said, That Leigh had the use of her body, and that she feared she was with child by him. That thereupon Slater should be discharged of the child, and she be committed to the house of Correction, during her life.; And that Alexander Leigh, the reputed father, should pay from the birth of the child, to the Churchwardens of Pinchback weekly 14 d. towards its maintenance, until the age of fourteen years, And the Overseers then to take the child. Afterwards 1. August 12 Caroli, at the Assises at Lincoln, upon complaint of the Inhabitants of Pinchback to the Judges, they ordered, That two of the next Justices, to the Parish where the Child was born (naming them) should take consideration thereof, according to the Statute, and settle such course therein, as to Justice appertained; whereupon those two Justices primo Martii, 12 Caroli, declared the said William Slater to be the reputed father, and that he should pay (the Child being five years old, and all that time having been maintained at the Parish charge) at one payment 18 l. to the overseers of the said Parish, and 14 d. weekly till the Child came to fourteen years of age, and to give his Bond of 50 l. for performance thereof: And the said Slater refusing to pay or give Bond, the said Justices of Peace committed him. Whereupon he sued out a Certiorari to remove the proceedings into this Court, who appearing upon an Habeas Corpus, and upon reading of the return, and hearing Counsel on both sides, Grimston being of Counsel for the said Slater, these points were resolved by the whole Court. First, That before the Statute of 3 Caroli cap. 4. the Justices at the Sessions had no authority to meddle in the case of bastardy, till the two next Justices according to the Statute of 18 Eliz. cap. 3. had made an order therein: and that then, and not before (the partie refusing to perform the order, upon his appeal giving reasonable security to appear at the next Sessions, and abide such order as the Justices there, or the more part of them should make, &c.) The Justices at the Sessions might make a new order, &c. otherwise not. Secondly, That by the Statute of 3 Car. cap. 4. the Justices of the Sessions have power and authority originally, to make an order in the case of bastardy; for the words of the Statute are, viz. That all Justices of the Peace within their several Limits and Precincts,

Precincts, and in their several Sessions, may do and execute all things concerning that part of the Statute touching Bastards, begotten out of Lawful Matrimony, That by Justices of the Peace in the several Counties are by the said Statute limited to be done. And therefore the first Order made by the Sessions was in this case good and legal, and the second Order made by the two next Justices, void and could not alter or revoke the Order which was first made by good authority: And for proof thereof one Pridgeons Case, Quod vide ante pag. 341. & 350. was cited. Thirdly, It was objected, That the commitment of Elizabeth Eaton for life, for her first offence, was more than the Justices had authority to do; and therefore the Order void. But it was resolved, That an Error in part, and in that part of the Order which only concerned her, should not vitiate the whole Order.

Goodier *versus* Platt. Hill. 11 Car. rot. 349.

3.

ERror of a Judgment in the Common Bench, in Formedon. The Judgment was upon Verdict, Quod recuperet seisinam de uno Messuagio & duabus acris Terræ & Pasturæ not mentioning severally the quantity of the Land, nor the quantity of the Pasture, which being ill for the incertainty, it was moved, That the Judgment might be affirmed for the Messuage, which is certain as to that. But it was held, That though the Common Bench might have given Judgment for the Messuage only; yet when they have given an intire Judgment for the Messuage and Land, this being ill in part, ought to be reversed for the whole; And cannot be affirmed for part and reversed for the residue. 1 Rol. 779. 2 Cr. 290. 1 Rol. 779.

Turner *versus* Lee.

4.

REplevin The Defendant avows as Executor, for the arrears of a Rent-charge, granted to the Testator for divers years, if he lived so long. The Plaintiff takes issue, Quod non concessit, & found for the Avowant. And after Verdict it was moved in arrest of Judgment by Rolls, That this avowry was not good, because the Rent granted for years, being determined, The Executor cannot, by the Statute of 32 Hen. 8. distrain: For that Statute extends to those who have Rent for life or Inheritance. But Henden Serjeant said, That it is within the equity of the Statute, because the estate is determinable upon a life. And if it were not good, yet being admitted, and the Issue being upon the grant, and found, It is good enough. But all the Court resolved, That it is not within the Statute; for that provides remedy where the Testator dyed seized of a Rent to him and his heirs; Or for life, and by his death there was not any remedy for the Executor, as it appears by the preamble of that Statute: But where he hath remedy by the Common Law, by Action of Debt, as in this Case the Executor hath, Co. Lit. 162 a.

hath, he cannot diſtrain; And although the Iſſue is upon a Non conceſſit, and it is found Quod conceſſit, yet it being an ill Avowry in ſubſtance, Judgment ſhall be given againſt him.

Anonymus.

5. ACtion for words, Whereas the Plaintiff was a Grocer, and lived by his Trade of buying and ſelling, That the Defendant, to ſcandalize him, ſaid of the Plaintiff, He is a Beggerly fellow, and not able to pay his Debts. Upon Not guilty pleaded, and found for the Plaintiff, Rolls moved, That theſe words were not Actionable. But all the Court, againſt him, That the Action lies; For theſe words *tant amount*, as if he had ſaid, he had been a Bankrupt.

Snape *verſus* Turton.

6. Jones 392. 3. 2 Ro 263. 701. UPon a ſpecial Verdict it appeared, That Arthur Robſart, 15 Eliz. made a Conveyance to divers uſes (viz.) to the uſe of himſelf for life, with divers Remainders over, with a Proviſo, That if he made a Conveyance of the premiſſes in Fee, or Fee taile, That it ſhould be good, and a revocation of the former uſes. And it was found, That he made a Leaſe for years, and the next day granted the Reverſion in Fee, To which the Leſſee attorned. Whereupon it was reſolved, That although there be not one intire 2 Rol. 263. 701. Eſtate in Fee conveyed; yet both being found, and that it was with an intent to make a Fee to paſs, that this was a revocation within the Proviſo.

Termino

Termino Trinitatis, anno decimo tertio *Caroli* Regis, in Banco Regis.

Blague *versus* Gold. Hill. 12 Car. rot. 752.
Cujus principium pag. 447.

THis Case was now argued again by Robert Hide for the Plaintiff, and by Charles Jones for the Defendant; and the Case was cited as before, but only this clause added, which was in the Will (viz.) Upon condition, that the same be new built, according to the Covenants betwixt me and *Bernard Calvert*. And it was found, that this house was the house in Question, and was, at the time of the Will making, in the tenure of Hitchcock, and that the corner house was in the tenure of Wilson and Nott; and that the Covenants with Bernard Calvert were for the reedifying of the said corner house: Et si super totam, &c. And this being now argued, Jones, Berkeley and my self (absente Brampston) delivered our opinions seriatim. That the corner house only passed by the Will, and not the house adjoyning, in the tenure of Hitchcock: For although the corner house was not in the tenure of Hitchcock, but a mispriſion, yet the Devise is good; for it is sufficiently ascertained before, viz. the corner house in Andover. And the addition in tenura Hitchcock, although it be not in his tenure, and is a mistake, yet it is but surplusage; and although false, shall not vitiate the Devise, because the Devise was of a thing certain at the first, and shall be expounded according as the intent of the parties is apparent; and it is the stronger here, by reason of the Covenant to reedifie the corner house, and not the other. Vide Dyer 376, Cottons Case, & Dy. 292. 2 Ed. 4. fol. ultimo, Cok. 2. Doddingtons Case fol. 32. Plowd. Wrothfley and Adams Case. Wherefore it was adjudged for the Plaintiff. 1. 2 Rol. 545. 2 Cr. 22. Co. 3. 10. a. Hob. 171.

Evans and Fynches Case.

EVans and Fynch were arraigned at the Goal-delivery of Newgate: For that they, about twelve of the Clock in the forenoon, broke open Domum mansionalem *Hugonis Audeley* in the Inner Temple, no person being in the said house, and stole from thence forty pounds. And upon the evidence it it appeared, That the said Evans, by a Ladder, climed to the upper window of the said 2. Jones 394.

Hugh Audley's Chamber, and took out thereof the said fourty pounds; and that the said Fynch stood upon the Ladder in the view of the said Evans, and saw Evans in the Chamber, and was assisting and helping to the committing of the said Robbery, and took part of the money. And all this matter being found, it was adjudged, Because the said Fynch did not enter into the Chamber, 3 Inst. 65. That he was not within the Statute of tricesimo non Elizabethæ, which takes away Clergy where an house is broke open, and the Robbery is above the value of 5 s. no person being therein, and Co. 11. 37. a. that he should have his Clergy, which was allowed him. And as for Evans the special Verdict found, that it was in the Chamber of Hugh Audley in the Inner-Temple, And that the Robbery was committed betwixt twelve and one of the Clock in the day time, no person being within the Chamber at the time of the breaking thereof, but that divers persons were in the Inner-Temple Hall and in other places of the house: And whether this be a breaking open the house and taking of Goods above the value of five shillings, nulla persona being within the house, And within the said Act of tricesimo nono Elizabethæ, they prayed the discretion of the Court. And first it was resolved, That a Chamber of an Inns of Court or Chancery broken open, may be said to be Domus mansionalis of him who 3 Inst. 65. is owner of the said Chamber: Whereof at first I doubted, until I Jones 394. was informed that divers presidents were for Burglary in breaking open such Chambers. Secondly, It was resolved upon this special Verdict (being removed by Certiorari into the Kings Bench, And the Prisoner removed by Habeas Corpus) That this breaking open the Chamber and taking forty pounds out thereof nulla persona being therein (although there were divers persons in other parts of the house) was within the Statute of tricesimo nono Elizabethæ, which takes away Clergie from such offendors: Whereupon Clergie was denyed unto the said Evans, And Judgment given in the Kings Bench, That he should be hanged.

Ceely *versus* Hopkins and his Wife.

3. 1 Rol. 46. ACtion for words. Whereas the *Feme*, dum sola fuit, spake of the Plaintiff these words, He is a Witch and a strong Witch, and hath bewitched me and my Aunt *A. S.* (the Aunt of the said *Feme* innuendo) Therefore I will not marry him. The Defendant pleaded Not guilty, and it was found against her, and damages given to forty pounds. And moved in arrest of Judgment by Germin Serjeant, That these words be not actionable: For to call one Ante 324. Witch generally, is not actionable, as it was adjudged in this Court nono Caroli, betwixt George and Harvey, and in another Case before betwixt Hawkes and Ange. And for the latter words, It is not said that he did them any bodily harm; And his bewitching, without doing some bodily harm to the Person or Cattel, is not punishable by the Statute of primo Jacobi; so when he is not indangered

indangered by such words, there is no cause of Action at the Common Law. And all the Court held That for the first words, Thou art a Witch, and a strong Witch, no Action lies, for they be too general. But to say, You have bewitched me and my Aunt, Brampston, Jones, and Berkeley held, That the Action lies; for it shall be intended he bewitched them in their persons: And although it be not shewn, that any bodily wrong or harm was done to them by this Witchcraft, yet it is an offence punishable by the Statute, which doth not mention bodily harm to the person of any; but generally, if he bewitch any person, it shall be an offence punishable by the Statute. But I much doubted thereof; for words shall be always taken in mitiori sensu, and not in an ill sense if they may have any reasonable intendment: And here it may be that he bewitched them with fair words, as the common saying is. And the words subsequent maintain that intent, Therefore I will not marry him. But the other Justices said, That they would not so intend it. But he ought to have pleaded specially to have extenuated it, if he would have it to be so intended. But they would further advise. Et adjournatur, residuum postea. pag. 480

Dodson *versus* Lynne. Trin. 11 Car. rot. 446.

4. Jones 394. 2 Rol. 357. R. 141.

EJectione firmæ of a Lease of an house and Lands in Mowlesworth, for three years. Upon Not guilty pleaded, and special Verdict, the case was. Edward Lynn the Defendant, being Parson of Moulsworth, the Land in the Declaration being found to be parcel of the Glebe of the Rectory, and that the said Rectory is a Benefice with Cure, over the value of 8 l. per annum; It was found, that he was Chaplain to the Earl of Salisbury, and obtained Licence from the Archbishop of Canterbury to accept of another Benefice Modo sit infra ten miles of the former, which was confirmed under the Great Seal. Lynn accepts another Benefice with Cure, which was found to be distant seventeen miles from the first; and was instituted and inducted thereto, both being within the Dioceses of Lincoln, And that the Archbishop made his visitation within the Dioceses of Lincoln, and inhibited the Bishop of Lincoln to execute any Jurisdiction during his Visitation; And that the Patron omitted to present to the first Benefice within the six months; and that the Bishop of Lincoln within the second six months collated the Lessor of the Plaintiff to the first Benefice, who was admitted, instituted, and inducted thereto, and made the Lease. And whether the Plaintiff hath good title against the Defendant was the question? the principal doubts herein were, whether sit modo was a condition in this Licence, and made the first Benefice void when he took the second? Secondly, whether the Bishop collating, during the time of the Archbishops Visitation, and after his inhibition, were good? And because these questions concerned Ecclesiastical Jurisdiction, the Court required to hear Civilians in these points. And

Doctor Duck and Doctor Eden argued on the part of the Defendant, And Doctor William Lewen for the Plaintiff. And it was moved on the Defendants part, and there was shewn divers Texts in the Civil Law, That modo and dummodo are express Provisoes in such Licences, and do not make a condition, unless there be added other words, That if he do otherwise, that then it shall be void, But is only as an admonition or caution, That he shall be punishable by Ecclesiastical censures, if he doth otherwise: And that this hath been always the exposition upon granting such Licences. And after argument at the Barr all the Court resolved, That this being there the exposition always, after the Statute, although it be generally a condition in the exposition of the Law, as Dummodo, Ita quod, and the like, yet it is now to be expounded as it hath been usually; otherwise great inconveniences would ensue, the multitude of Benefices would be void, and in lapse to the King, where they have been quietly enjoyed by the other construction, after such avoidances pleaded. And therefore they all agreed, that it should not be here taken as a condition to make the first Benefice void by the Statute of 21 H.8. But should be left as it was at the Common Law before the Statute, And that the taking of a second Benefice makes not the first void quoad the Patron, until deprivation, as it is in Cok. lib. 4. fol. 75. b. in Hollands Case. And then the second question, Whether the Collation by the Bishop, in the time of the Arch-bishops Visitation and after inhibition, will not be material: Wherefore it was adjudged for the Defendant.

R. 421. 696.

Co. Lit. 203. b. 204.

Baker *versus* Willis and others. Pasch. 11 Car. rot. 46.

5. 2 Ro. 357. Jones 393. Co. 9. 138. b.

EJectione firmæ upon a Lease for seven years, of a Messuage and Lands in Murialgrang in the Parish of Belton. Upon Not guilty pleaded, and a special Verdict found, the case was, John Beamond and Elizabeth his wife, Tenants in Tayle to them, and the Heirs of their bodies, of the gift of Sir Humphry Foster, Remainder to the right Heirs of the said husband, the said John Beamond having issue betwixt them Franc. Beamond, in 6 Ed. 6. levies a fine *sur cognusance de droit come ceo*, to King Ed. 6. with proclamations. The King anno septimo Regni sui grants those Lands to Francis Earl of Huntington and his Heirs: Afterwards in 2. Septemb. anno 5 & 6. Ph. & Mar. the said John Beamond died, upon the tenth of September the same year; Elizabeth enters, and Francis Earl of Huntington, died seized of the Reversion, which descended to Henry Earl of Huntington, who by Indenture betwixt him and the said Eliz. (in 16 Reg. Eliz.) reciting that the said Eliz. held the Tenements in Tayle, of the gift of Sir Humphry Foster, Remainder expectant to the right Heirs of the Earl of Huntington, ratifies, allows, and confirms to the said Eliz. all her Estate, Title, and Interest in the said Tenements, Habendum & Tenendum the said Tenements, to the said Eliz. and the Heirs of the body of her,

and

and the ſaid John Beamond ingendzed, with Warranty of the ſaid Tenements to the ſaid Eliz. and the Heirs of the body of her, and the ſaid John Beamond engendzed, againſt him and his Heirs. Elizabeth dies anno 29 Eliz. Francis Beamond enters and hath Iſſue Sir Henry Beamond, Sir John Beamond, and Francis Beamond, & dies 41 Eliz. Sir Henry Beamond by Indenture covenants to ſtand ſeized, to the uſe of himſelf and the Heirs males of his body, Remainder to Sir John Beamond his brother, and the Heirs males of his body, and afterward dies without iſſue male, his wife *enſeint* with a daughter (afterward called Barbara) the wife of Woolſtan Dixy the Leſſor: Afterward Sir John Beamond died, and had iſſue Sir John who entred and let to the Defendant, and Woolſtan Dixy entred in right of his wife, and let to the Plaintiff, prout in the Declaration, who entred, and the Defendant *ouſted* him, And whether the Plaintiff hath any Title was the queſtion? And it was divers times argued at the Barr, and now at the Bench by Berkeley, That Judgment ought to be given for the Defendant. Firſt, Becauſe the fine with Proclamations did barr the Eſtate Tayl, which John Beamond and the Heirs of the body of John Beamond and Elizabeth claimed; for he being barred as Heir of the body of his father, can never claim that Eſtate; for he is barred by the Acts of Parliament 4 H. 7 & 32 H 8. and he much inſiſted upon the validity of fines, that they be perpetual barrs againſt the Heir in Tayl of him, who levies the fine. Secondly, He argued that Eliz. by her entry immediately after the death of her husband, reduced the Eſtate Tayl back unto her, and it was lawful and ſaved unto her by the Statute of 4 H. 7 of Fines, and by the Statute of 32 H. 8. of Diſcontinuance: And that ſhe was Tenant in Tayl, and not Tenant in tayl after poſſibility, as it hath been argued at the Barr, nor in nature of ſuch a Tenancy in tayl, but an abſolute Tenant in Tayl to all purpoſes. Thirdly, that the tayl is ſo barred by the fine, and the Acts of 4 H. 7. & 32 H. 8. that he cannot claim; for he is a perſon diſabled to claim: As a perſon attainted, although he hath a pardon, cannot claim by deſcent: And as one preſented by Simony to a Benefice, being void, cannot be preſented to it again, for he is a perſon diſabled by the Act of Parliament; and by the confirmation to Eliz. nihil operatur unto her, nor to the Heirs of the body of her and John Beamond; Becauſe he in Reverſion had but a poſſibility to have it after the death of John Beamond without iſſue, and during the time he had iſſue, he might not claim: And a poſſibility cannot be transferred unto another: And John Beamond who entred ſhall have it as an occupant; for the Heir general is barred by the fine, and he in Reverſion cannot have it, as long as there is any Heir of the body of John Beamond and Eliz in eſſe, and any who enters ſhall have it as an Occupant, as in the Caſe 29. Aſſiſe. Wherefore he concluded, That Judgment ſhould be given for the Defendant; for he had the priority of poſſeſſion. But I argued to the contrary, That Judgment ought to be given for

Co. 9. 141. b.

Co. Lit. 8. a.

Co. Lit. 120. a.

Co. 9. 141. b.

for the Plaintiff. First, I agreed, That the fine with Proclamation, was an absolute barr and discharge of the Estate Tayl, against John Beamond and the Heirs of his body, by the express words of the Statute of 32 H. 8. And it is quasi extinct against him by the fine, Vid. Co. lib. 3. fol. 51. Sir George Browns Case, and 5 H. 7. 30. Secondly, I agreed, That when Eliz. entred within the five years after the death of John Beamond, who levied the fine, she is absolute Tenant in tail; for the fine quoad the said Eliz. is absolutely avoided, and she is in, as in her former Estate, which is an absolute Estate Tayl, and no Tayl after possibility of issue extinct; and if she be to sue any real Action, she is to name her self Tenant in Tayl, Vid. Dy. 331. & 351. Thirdly, That notwithstanding the Estate Tayl is barred by the fine, yet this confirmation, being by Indenture, hath revived the Estate Tayl; For although he in Reversion, by reason of the fine, may enter, and have the Land, and the issue after the death of the wife is barred, to claim it; yet by this confirmation he in Reversion hath excluded himself against his confirmation, to claim it; For he may exclude himself of his Estate; and as he may avoid, so he may confirm, Vid. Coke lib. 1. Anne Mayos Case, 11 H. 7. 28. N. B. 98. a. where Tenant in ancient Demesn levies a fine, &c. And although at the time of the confirmation, he had nothing to confirm, and his words of confirmation will not add to the Estate of the wife, who had an Estate Tayl; yet by the words Habendum the Tenements, there is a new Estate tayle extracted out of the Reversion, and setled in Eliz. so as that confirmation is quasi perficiens & crescens, and as the case in Litt. *Feme* Tenant for life, takes an husband, a confirmation to the husband and wife, Habendum the Land to them, increaseth the Estate to the husband, Coke lib. 9, 139. b. And whereas it was held, that she had as great an Estate before, as she had by the confirmation, and therefore the confirmation was void. I held That although she had an Estate tayl, yet she takes by the confirmation; for a deed shall never be void, when by any intendment it may be allowed to be good, and to have any operation: And she takes it for the benefit of the Heirs of her and her husbands body; and although the Heir be barred by the fine, yet he is restored to the Estate Tayl by the confirmation; for as the fine was an Estoppel to the Heir to claim against the fine; so the Indenture of confirmation is an Estoppel to him in Reversion, to say that he shall not hold it in Tayl, and there it is an Estoppel against an Estoppel which sets the matter at large, as it is Cok. Lit. 352. b. 12 H. 7. 4. And although it was said by my brother Berkeley, That the Earl of Huntingron hath but a possibility to have it after the death of Eliz. and that he hath it but as an Occupant, to have and injoy it during the time that John Beamond had issue of the said Eliz. I utterly denied, That he hath but a possibility; for he hath it as in right of his Reversion, if his confirmation had not barred him, and that appears by Austins case in Plowdens Commentaries, and in 38 & 39 Eliz.

Co. 8. 72. a.

2 Cr. 689. Ante 435.

Co. 9. 140. a.

Co. 9. 141. a.

Co. 10. 50. a.

Sect 525. Co. 9. 139 b.

Eliz. Husleys Case, where an Estate is barred, or discharged, or extinct, as Sir George Browns Case, Cok. lib. 3. fol. 50. terms it, Where he in Reversion shall have it, as in point of Reversion, and if he hath but a possibility, yet that may be well transferred by confirmation or release, to him who hath the possession of the Land, as it is resolved Cok. lib. 4. fol. 64. Fulwoods Case, and lib. 10. fol. 48. a. Lampets Case, And as it is holden Cok. lib. 1. Corbets Case, That there is no Condition, Proviso, or any other title, but may by apt words be determined, the one way or the other; so here every part agreeing, the Estate Tayl shall be revived, or at leastwise newly created, and the Law shall adjudge it according to their interest: And therefore I was of opinion, That Judgment should be given for the Plaintiff. But Jones and Brampston chief Justice deferred their arguments that day, hearing that the parties were about agreement: And afterward by our means they compounded, and Sir John Beamond agreed to pay 5000 l. and the others agreed to assure the Estate by fine, or otherwise, &c. Et sic materia prædicta sopita fuit, and no Judgment given. But Jones told me, That he was cleer of opinion, that the Plaintiff had good title, and that the confirmation was good, and created a good Estate in Eliz. descendable to her Heirs.

Termino

ac

Termino Michaelis, anno decimo tertio *Caroli* Regis, in Banco Regis.

Ceely *versus* Hopkins. Quod vide ante pag. 474.

1. Jones 396. 1 Rol. 46. WAs now moved again by Germin Serjeant, and prested to have Judgment. And all the Court resolved; for as much as the words are, Bewitched me and my Aunt, and she is found guilty of malitious speaking of them, it shall be intended and conceived, to be spoken according to the common sense of bewitching their persons, and not of bewitching with fair words; whereupon Judgment was given for the Plaintiff.

Sherlock *versus* Chandrie or Chandler. Hill. 12 Car. rot. 618.

2. Jones 395. 2 Rol. 812. ERror to reverse a Judgment in Replevin. The Error assigned by Grimston, was in the mis-trial of the Issue, because the Issue being, Whether Lands in Bromley were held of the Manor of Webbs by such services, the Venire facias was awarded de vicineto de Bromley, where it ought to be de vicineto of the Manor, Or de vicineto de Bromley and of the Manor? And all the Court (Brampston absent) held, That the Tryal by the Common Law ought to have been per vicinetum of both: And that such a mis-trial had been cause of reversal, &c. But by the Statute of 21 Jac. cap. 13. it is aided, which points, that if a Trial is to be of several places, it shall be tryed per vicinetum of any of the places, and it is well enough.

2 Cr. 8.

Ante 17. 162.

Seaman *versus* Bigg. Trin. 13 Car. rot. 1009.

3. Jones 395. ACtion for Words. Whereas the Plaintiff was Servant in Husbandry to J. S. and was his Bayliff, and in great trust with him, and thereby got his means and maintenance. That the Defendant to disgrace and discredit him with his Master and others, spake of him these words, Thou art a cozening Knave, and hast cozened thy Master (innuendo the said J. S.) of a bushel of Barley: The Defendant makes justification, and found against him: And now Farrer moved in arrest of Judgment, that these words

words be not actionable; For no Action lies for calling one cozening Knave or cheating Knave. But all the Court (Brampston being absent) held, That true it is, generally an Action will not lye for calling one cozening Knave; yet where they be spoken of one who is a servant and accomptant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is deprived of his livelyhood and means of maintenance, there is good reason it should bear an Action, that he might have recompence for loss of his credit and means, &c. Wherefore it was adjudged for the Plaintiff.

South and others, Bayl for Jefferson, at the Suit of Gryffith, Hill. 12 Car. rot. 559.

ERror of a Judgment in the Common Bench, brought by the Bail; And the Writ supposeth, That the Error was in the principal Judgment: And also in the Judgment upon the Scire facias against the Bail. Et in redditione Executionis superinde. And the Error was assigned in the Execution against the Bail, That no Capias was awarded against the principal. And Jones said, It was a question stirred in the Common Bench, Whether an Execution might be in the Common Bench against the Bail, where no Capias issued against the principal? And Hobart chief Justice, was of opinion, That it might, Because the Recognisance by the Bail in the Common Bench differs from the course of the Bail in the Kings Bench: For there the Recognisance is in a sum certain, That the principal shall render his body. But all the other Justices there held, That it is all one in the Common Bench and in the Kings Bench, That a Capias against the principal ought to be taken forth, and returned Non est inventus, Otherwise no Scire facias ought to be against the Bail: For if the principal be taken by the Capias, or that he render himself to Prison upon the Judgment, Then no execution ought to be against the Bail. And of this opinion was all the Court here. Then it was moved, That this Writ of Error was ill, Because the Writ of Error is brought by the Bail for Error in the principal Judgment, which the Bail cannot have. And thereto the Court agreed, That the Bail cannot assign Error in the principal Judgment, nor can take advantage of any Error therein. And they further held, That if the Writ of Error had been brought for Error only in the principal Judgment, it had been clearly ill: But because the Writ of Error supposeth Error in the principal Judgment, and also in the Judgment upon the Scire facias against the Bail, as also in redditione Executionis superinde, Jones held, That the Writ of Error will lye for that part, and shall be void for the residue. But Berkeley and my self (Brampston being absent) were of opinion, That the Writ was ill, and should abate in all, Because it is grounded upon the first Judgment, and also upon the Judgment in the Scire facias; and

4. Jones 396. 1 Rol. 333. 749. 779.

1 Rol. 333. 779

Post. 561. 2 Cr. 171. 1 Rol. 749.

1 Rol. 749.

ſo coupling them together, all is void: But if the Bail in their Writ of Erroꝛ had recited the firſt Judgment (as of neceſſity they muſt make mention thereof) and the ſecond Judgment in the Scire facias, and alledged Erroꝛ in that Judgment and in the execution thereof, &c. it had bꝛeu well enough.

Sacheverill *verſus* Porter. Trin. 11 Car. rot. 324.

5. Jones 357. 1 Rol. 400. 2 Rol. 60. l. 3. THeſpaſs, quare clauſum fregit, et cum Averiis depaſc. &c. Upon a ſpecial Verdict, the Caſe was, That one Fulk of Peterborow, and others, were ſeized in Fee of the place where, being a great Waſte called Atterhall-heath; and being ſo ſeized anno ſecundo Henrici quarti, granted by Deed indented, to the Pꝛioꝛ and Convent of Stone, (who were ſeized in Fee of three Meſſuages, one hundꝛed acres of Land, thirty acres of Meadow, and fifty acres of Paſture in Stallington) Common foꝛ him, et omnibus tenentibus ſuis in *Stallington* pro omnibus averiis ſuis communicabilibus omni tempoꝛe anni in prædicto vaſto. Habendum the ſaid Common of Paſture to the ſaid Pꝛioꝛ and Convent, et Succeſſoꝛibus et tenentibus ſuis inperpetuum. The Pꝛioꝛy being diſſolved, the King grants the ſaid Tenements, with all Commons to them appertaining and therewith enjoyed, to Rowland Hill and his Heiꝛs; who by Feoffment conveys three and thirty acres, parcel of thoſe Tenements cum pertinentijs, to the Defendant; who theꝛefoꝛe juſtifies the uſing of the ſaid Common appurtenant. The firſt queſtion was, Whether Common created ſecundo Henrici quarti, and ſo within time of memoꝛy, granted to the Pꝛioꝛ and Tenants, &c. may be ſaid Common appurtenant to the ſaid Tenements in Stallington? Reſolved, That it may. Foꝛ being granted to him and his Tenants of Stallington, it is Common appurtenant, and may paſs by Feoffment as Common appurtenant, together with the ſaid Tenements. Secondly, Although but part of the Land is conveyed, and not the intire, yet it is Common appurtenant, as Common foꝛ the Beaſts levant and couchant upon the ſaid Tenements, and well ſhall paſs with them by the woꝛds cum pertinentiis. And although it be Common created within time of memoꝛy, it is Common appurtenant, and may be well appoꝛtioned. Vide Co. lib. 8. 78. Weilds Caſe. Thiꝛdly, Although the pleading and Verdict is, That Feoffment was of part of the ſaid Lands, and doth not ſay, that it was by Deed, yet it is good enough: Wheꝛefoꝛe it was adjudged foꝛ the Defendant. Vide 36 Aſſ. 3. 15 Aſſ. 11.

1 Rol. 400.

1 Rol. 234. Co. Lit. 122. a. Co. 8. 79. a.

Ante 162. 181. 2 Cr. 411.

The Caſe of the Lady Fulwood, and others.

6. THe Lady Fulwood, Roger Fulwood, Richard Bowen, and diveꝛs others (not Pꝛiſoners, but at large) were endicted in the County of Surrey, That whereas Sarah Cock was a Maid, who had

had a portion of 1300 l. The said Roger Fulwood, by the procurement and abetting of the said Lady Fulwood, at the Parish of St. Saviours violently, and with force, and against the will of the said Sarah, took and carried the said Sarah to Saint Saviours, and there married her, by the aid and procurement of the said other persons, against the form of the Statute in that case provided. And upon this Endictment they being arraigned, pleaded Not guilty, and put themselves upon the Country. And the said Roger Fulwood, Richard Bowen, and one John Hoxton a Coachman, were endicted in the County of Middlesex, de eo quod the said Sarah being a person having a portion of 1300 l. for lucre of the gain of the said portion, they took her at Newington in the County of Middlesex against her will, and carried her to St. Saviours in the County of Surrey, and there the said Roger Fulwood, by the aid, abetment, and procurement of the said Bowen and others, married the said Sarah in the said Parish of St. Saviours in the County of Surrey, against the form of the Statute in that case provided. And upon this the said Fulwood, Bowen, and the Coachman were arraigned, And prayed Counsel to be assigned them, to be advised what they should plead for matter in Law: For it was pretended, That this taking in one County and marrying in another County, was not triable in the County of Surrey: And thereupon Holbourn and Serjeant Henden were assigned of Counsel with them. And they alledged, That in the Case of one Bruton, it was resolved upon a reference out of the Star-chamber by all the Justices, That the taking away of a woman, unless she be married or defiled, is not felony within the Statute: And hereupon the Counsel prayed, That they might have a Copy of the Endictments: And it was allowed by the Court, That they should have a Copy of the Endictment in Middlesex, but not of the Endictment in Surrey. Residuum postea pag. 484, 488, 492.

Sir John Fitzherbert *versus* Sir Edward Fitzherbert, and others.

EJectione firmæ. Upon evidence to the Jury, it was resolved by all the Court, Whereas Sir Thomas Fitzherbert and Sir John Fitzherbert his brother, being Tenants for life, the one in Remainder after the other, the Remainder in tail to Thomas Fitzherbert their Nephew, upon purpose to bar this intail, the 1 Octob. 25 Eliz. made a lease for years, with agreement, That the Lessee should make a Feoffment of this Land, who accordingly the twelfth of October made the Feoffment; And afterward, on the seventeenth of October, Sir Thomas Fitzherbert released to the Feoffee with warranty, and on the nineteenth of October, Sir John Fitzherbert released to the Feoffee with warranty, and both these warranties descended upon Thomas Fitzherbert in Remainder; Resolved, That these Warranties were Warranties commencing by disseisin, 7, Jones 395. Co. 5. 79. b. Co. 5. 79. b. Co. Lit. 367. a.

although they were created seven days after the Feoffment: For the Feoffment was made by Covin, and with an intent and agreement precedent, That there should be such a Feoffment and Releases made after, and they be all but as one Act, grounded upon this fraud and
Ante 305. practice and shall not bind him in Remainder. Secondly, It was moved, If Thomas, after this Disseisin, not knowing of the Disseisin, had levied a fine to the stranger, Whether that should have barred his right, and enured to the benefit of the Disseisor, according to Co. Lib. 2. fol. 56. a. Bucklers Case, which, if admitted, would be of a very mischievous consequence? But herein the Court delivered no opinion.
Jones 316. But Brampston and my self conceived, That it should not enure to the benefit of the Disseisor, but to the use of the Conusor himself; For otherwise a disseisin being secret, may be the cause of disinherison of any one who intends to levy a fine for his own benefit, for assurance of his Lands upon his wife and children, or otherwise.

Moulin *versus* Sir George Dallison.

8. THe question being, Whether the manner of Sherfield was by custome descendable to the eldest Daughter? The Plaintiff, to prove this custome, shewed, That it was parcel of the Manor of Odiham, which is ancient Demesn: In which Manor the custome is, That Lands are descendable to the eldest daughter. But on the other part was shewn, That it cannot be parcel of the Manor of Odiham, because it appears by divers Records, That this Manor of Sherfield was held of the King by grand Serjeanty: And although it was agreed on both parts, That there is such a custome within the Manor and Hill of Odiham; yet for as much as the Manor of Sherfield holds by such service, It cannot be parcel of the Manor of Odiham. But to that was answered, That this Tenure in grand Serjeanty was created by King Edward the second; And if there were such an ancient custome, it cannot be destroyed nor altered by alteration of the Tenure; which was agreed by all the Justices. Whereupon because divers presidents were shewn, That Lands of the Freeholders used to descend there to the eldest daughter, And Lands in Sherfield used to be recovered by a Writ of Right close, in the Court there, it was left to the Jury to inquire, Whether there were any such custome? And because the Jurors, lying all night, could not agree, a Juror by consent was drawn: Afterwards the Defendant pray'd a new Trial, and a Tales by Proviso; But it was held by all
Co. 10. 104. the Court, that the Defendant could not pray a Tales this Term, but he might in another, &c.

The Case of Fulwood. Ante pag. 482.

9. THe Presidents of the Court were searched, and one President was shewn Pasch. 31 H. 8. rot. 14. inter placita Regis, When Henry Sturges and Philip Sturges were endicted for the
Hob. 182. taking of one Agnes Hobson against her will, who was the daughter

daughter and heir of John Hobson, who was seized of Lands to the value of 20 l. per annum: And they pleaded to the Endictment, That they ought not to answer, pro eo quod non mentionatur in the said Endictment, quod ceperunt ad intentionem maritandi prædictam *Agnetem* vel ad prostituendam, &c. and they were discharged. Another Record was shewn, Hil. 3 & 4 Ph. et Mar. rot. 10. Roger Thompson and Peter Rewley were endicted pro eo quod felonicè ceperunt *Margaretam Burton* et *Margeriam Burton*, daughters and coheirs of one Roger Burton deceased, and against their wills, &c. And they pleaded, They ought not to answer to the said Endictment, pro eo quod non apparet in quo loco nec quomodo they took the said daughters, et pro eo quod non mentionatur in dicto Endictamento, That the said Roger or Peter married or defiled the said Margaret or Margery. *Ils alers sans jour.* Post. 489. Hob. 182.

Note that in the Lord Hobarts Book he sets down, That one Bruton exhibited his Bill in the Star-chamber against Edm. Morice, for stealing away his daughter, he being seized of Lands, and having Goods to the value of 5000 l. and she was not his heir, for he had a son: And she was inticed away by friendship, and then by force carried into Suffolk, and there married, And whether this were within the Statute of 3 H. 7. cap. 2. was referred to the two chief Justices, and to have the opinion of the other Justices: And they all upon perusal of the Statute and view of Presidents, resolved, That it was not within the Statute; for although they held, That the party being first taken away with her own consent, and after by force carried into Suffolk (from which time the forcible taking began) was forcible taking away within the intent of this Act: And although the words in the purview seem to be general, and to extend to all women unlawfully taken against their wills, yet considering that the preamble of the Statute cannot be conceived to be idle, but must be intended to restrain the purview to the particular cases in the preamble mentioned, That is to say, that they shall be Maids, Widows, or Wives, their substance in Lands or Goods, or otherwise heirs apparent, that the motive be lucre, and the end to be married or defiled: And the purview, That what person or persons should steal away a woman so against her will unlawfully, &c. It was conceived, That this word so did imply, and bind up the preamble to the purview, otherwise the word so were idle and might have been spared, if it did not declare the motives and the ends of the Action, which in this case are lucre and luxuriousness: Presidents were shewn Pasch. 9 H. 7. An Endictment against Hyelord and others, Hill. 3 et 4 Ph. et Mar. against Polley, wherein no mention is made, That they were intitled to Lands or Goods, or that they were heirs apparent. But there were seven or eight Presidents shewn, wherein it was mentioned: And that in the Lord Andersons Reports, 1 Hill. 16 Eliz. it was agreed by the Justices, that if a woman be taken against her will and inforced to contract her self in marriage, yet Hob. 182. 3 Inst. 61. Hob. 182.

is

Hob. 183. is not married, it is no felony; But if she be married or defiled, it is felony. And there it was said, That if the taking of such a woman, and the marrying or defiling be in several Countries, it is felony compounded of all the three parts, as stroke, and death are but one murther. Residuum postea pag. 488, 492.

Sydnam and Parrs Case. Mich. 13 Car. rot. Surrey.

10. SYdnam and Parr were brought to the Bar by Habeas Corpus: Wherein was returned, That they were committed to Goal, by one Read Justice of Peace of the said County, by force of the Statute of 15 R. 2. upon complaint of one J. S. that he claimed Common in a Meadow of the said Sydnams, called Monks Meadow: And that the said Sydnam and Parr entred into the said Meadow, and kept him out from his Common with force and arms; Wherefore he was prayed to view the force, and that he came thither and found them holding the said Meadow with force; whereupon he by vertue of the said Statue committed them to Goal. Upon the motion of Grimston, and reading the return, all the Court (Brampston being absent) held, This commitment was not warranted by that Statute; for although one may be disseized of a Rent or Common by force, which is inquirable in Assizes, and punishable if it be found: yet one may not be endicted or committed for entring his own Land with force, or holding his own Land with force, against a Commoner; for it ought to be ubi ingressus non datur per legem, And one in his own Land may enter lawfully, and may detain with force against any who pretend to have Common there, he being allowed to be owner of the Soil: And this Statute is not to be extended against any, but him who enters unlawfully, and *ousts* another of his lawful possession; wherefore the cause of committing and detaining them in prison, was held unlawful, and the prisoners were discharged.

Ante 201.

Bower and his Wife *versus* Cooper.

11. ACtion upon the Case in London for words of the *Feme*, Thou art an Whore, and a two peny Whore. Upon an Habeas Corpus this cause being removed, I signed a Procedendo; Because I was informed it is good cause of Action in London by the Custom, (for they ought to punish such persons there with Carting and Whipping) and that it lies not in this Court. And now Phesant moved to have a Supersedeas, and the cause removed; for he said it was against Law to suffer such Actions to be prosecuted in London, upon pretence of a Custom, where they are not maintainable

1 Rol. 550.
2 Rol. 69.

tainable in the ſuperior Courts: And that for calling one Whore or Adulterer and the like, an Action lies not at the Common Law, Vid. Regiſter 54. Cok. lib. 4. Murfords Caſe, where for theſe words it was held an Action lies not: But Stone prayed, That no Superſedeas might be granted; for he ſaid an Action lies in London for theſe words by the Cuſtom; Becauſe an Whore there is to ſuffer corporal puniſhment, viz. carting and whipping: And it is an offence preſentable at the Wardſmotes-Inqueſt, and there puniſhable; ſo being ſubject to a corporal puniſhment, It is reaſon ſhe ſhould have her Action there. And if the party conceives himſelf grieved, he may have a Writ of Error; And if againſt Law, may reverſe it: And cited Trin. 8 Car. Such a cauſe being removed by Habeas Corpus, A Procedeno was awarded in this Court upon debate. And ſo all the Court held here, except Berkeley; who conceived, That a Superſedeas ought to be granted. And it was alledged by Stone, That by the Statute of 21 Jac. after a Procedendo is granted, no Superſedeas ought to be awarded. But the whole Court was againſt him in that point: For when a Procedendo unduly vel improvide emanavit, the uſe is to grant a Superſedeas. But here it was conceived by Jones, Bramſton, and my ſelf, That the Procedendo was well awarded; therefore we denied to grant a Superſedeas.

2 Cr. 485.

2 Rol 69.

Ante 350. 1 Rol. 550. Co. 4. 18. a.

Kinnion *verſus* Davies. Trin. 12 Caroli, rot. 1096.

ERror of a Judgment in the Common Bench, in an Action upon the Caſe, Pro eo quod the Defendant, Quendam Canem ad mordendum Oves conſuetum apud *Hindon* ſcienter retinuit & cuſtodivit; qui quidam Canis, ſuch a day and place one hundred Sheep of the Plaintiffs ibidem inventos tam graviter momordit, quod twenty of them died of the ſaid biting, and the others were much hurt. Judgment being given there by default, the Error aſſigned by Grimſton was, That the Declaration was not good: For he doth not ſhew, according to the uſual courſe, Quod ſciens Canem prædictum ad mordendum Oves conſuetum ſcienter retinuit, For it may be, that he Scienter retinuit Canem; and yet knew not that he was conſuetum ad mordendum Oves, which is the main point of the Action: And upon reading the Declaration, all the Court held (abſente Bramſton) that it was not good: whereupon Rule was given, that the Judgment ſhould be reverſed, unleſs, &c.

12.

1 Rol. 4.

1 Rol. 4. Ante 254. Co. 4. 18. b. 2 Cr. 45.

The

The Case of Fulwood. Ante pag. 482, 484.

13. ROger Fulwood, Richard Bowen, and the Lady Fulwood were endicted by a Jury of Surrey, wherein was supposed, That the said Roger Fulwood, Richard Bowen, the Lady Fulwood, and others, upon the twenty third of August, anno Caroli, at Southwark in the County of Surrey, violenter & felonicè assaulted one Sarah Coxe, and her, there, took away by force and against her will; and the said Roger Fulwood, the 23 of August the same year at Southwark, married her, the said Sarah Coxe, by the abetment and procurement of the said Bowen and the Lady Fulwood. Upon this Endictment, being arraigned, they pleaded Not guilty, and now by a Jury of the County of Surrey, they were tried, and upon Evidence it appeared, That the said Sarah being an Orphan, and having 1300 l. for her Portion, was by force, with Swords drawn at Islington in the County of Middlesex, taken away against her will, by the said Richard Fulwood and Richard Bowen at eight of the clock at night, and put into a Coach with the said Roger Fulwood, and brought to the Strand-bridge, and from thence carried by water unto the Bishop of Winchesters house; and the nett day being the 23 of August, upon pretence of shewing her the house, brought into the Chappel, and being there much in fear (as she pretended and gave in Evidence) was married to the said Roger Fulwood, in the presence of the said Lady Fulwood his Mother, and of the said Richard Bowen and divers others: And Roger Fulwood brought divers Witnesses to prove she was willing to marry him; and that she being asked the question before by him, whether she were willing to marry him? answered, That she was willing, and appointed a Taylor to make her a Gown, and was found in bed with him; but she pretended it was by reason of his threats, and when she was in such fear as she knew not what she did. And hereupon Holbourn, who was assigned of Counsel for the Prisoners, moved, That for as much as the force was in Middlesex, and no force is proved in Surrey, That the Jury ought not to find them guilty in Surrey. But all the Court (Berkeley absent) delivered their opinions seriatim, That if the Jury found, That she
Hob. 183. was taken with force in Middlesex, and carried in a Coach unto Strandbridge, and brought by them into Surrey; it is a continuing force, and a forcible caption in Surrey, and an offence within the Statute. Secondly, Whereas it was alledged by Holbourn, That it was not a Marriage; (for she affirmed upon her oath in her examination, and now viva voce, That she knew not what she did; yet all the Court held (although this might avoid the Marriage) That it is such a Marriage, as is an offence within the Statute. But for the Lady Fulwood, because it appears not she was party to the forcible taking or consenting thereto, it was not an offence

fence in her within the Statute; Wherefore the Jury found Roger Fulwood and Bowen guilty, and the Lady Fulwood not guilty. And Holborn, being assigned of Counsel as aforesaid for matters in Law, arising upon the Evidence, or otherwise, after Verdict, moved in arrest of Judgment, That the Endictment was not good. First, Because it is not expressed in the Endictment, that the taking was, Ea intentione, that the said Roger Fulwood would marry or defile the said Sarah, which is the Exception in 31 Hen. 8. for which that Endictment was discharged. Secondly, that whereas divers were endicted, the Endictment was cepit, whereas it ought to have been ceperunt: but all the Court (absente Berkeley) resolved, that this was not any cause of Exception; For in regard it appears apparently by the Endictment, that they took her, & abduxerunt for lucre, and the same day married her, the said Sarah, that shews the caption to be with an intent to marry her; also there be no such words in the Statute Ea intentione, the offence being by reason of the caption against her will. And I delivered my opinion to be, that if one takes such a Ward forcibly and against her will, with an intent to marry her, it is Felony, although Marriage or defiling doth not follow thereupon: But Jones said, that it hath been resolved, and was so reported by Dalison, that forcible taking away against her will, if marriage or defilement did not ensue, was no Felony. Brampston doubted thereof. Residuum postea, pag. 492.

Ante 485.

2. L. Keym. 1198.

3 Inst. 61.

Wilner *versus* Hold.

ACtion for these words, Thou art a Rogue and a Rascal, and hast killed thy Wife (quandam Elizabetham nuper uxorem *le Plaintiff* innuendo.) After Not guilty pleaded, and found for the Plaintiff, and damages 20. marks, Atkins and Trevor moved in arrest of Judgment, that no Action lies for these words; for the words of Rogue and Rascal are but words of heat, for which no Action lies; And thereto the whole Court agreed. Secondly, It lies not for the words, Thou hast killed thy Wife, because it is not shewn, that his wife is dead, nor how she was killed, nor that she was violently killed or murdered; and although the Declaration is nuper his Wife: Yet that doth not prove that his Wife was dead; for it may be they were divorced. Sed non allocatur; For when it is said nuper his wife, it shall be intended she is dead, and not have such forrain construction, that she was divorced. And the Court further held, that the words, Thou hast killed thy Wife, shall be intended according to the usual speaking, that he killed her voluntarily: and whatsoever way he killed her, the words be very scandalous; wherefor it was adjudged, that the Action lies. 14.

Co. 4. 16. a.

Kniveton *versus* Latham.

15. Jones 400. 1 Ro 730.

DEbt, by Daniel Kniveton, Francis Kniveton, and William Kniveton, Executors of John Kniveton, upon an Obligation made to their Testator of 100 l. anno 9 Car. upon condition to pay 52 l. The Defendant demands *Oyer* of the Condition, which being entred, he pleads, that he paid the 52 l. to Francis, one of the Executors, in satisfaction of the said debt, and all interests and damages for it: And thereupon the said Francis released unto him the said Obligation. The Plaintiff replies, that the said Francis was within age at the time of the release, viz. of the age of 18. years; and upon this it was demurred: And now Alestre for the Defendant shewed the cause of demurrer to be, because he doth not deny the payment of the principal interest and damages: And although the Bond was forfeited rigore juris, yet acceptance is good cause of his making the release, and he is not to take advantage of the forfeiture of the Bond: and although he be an Infant, yet being above the age of 17. years, who may take upon him to be Executor, his release as Executor is good, and shall bind him and his Co-executors: But Rolls for the Plaintiff argued, that this release, being by an Infant, is void; for the Bond being forfeited, the intire 100 l. is due, and acceptance of part of a sum, viz. 52 l. cannot be taken as satisfaction; and this release shall not prejudice him, being an Infant; for he hath lost thereby, and is in danger of a Devastavit. And of this opinion were Jones and Berkeley, that a Release by an Infant, although he be Executor, without receipt of the intire debt, is not good, nor shall bind him: For although it is against conscience, that he should take the forfeiture of the Bond, yet he may, if he will. And Berkeley held, that this giving a discharge of the intire Bond, shall be a Devastavit, by which the Infant being to receive prejudice, that Deed shall not bind him. But I held, that for as much as he did it only as Executor, and according to good conscience, and none denies, but that there was payment made of the principal debt, there is good cause this Release should bind him; and that it should not be a Devastavit, because he did that which he was compellable to do in a Court of Conscience. Vid. Cok. lib. 5. fol. 27. b. Russels Case 16. Hen. 6. Release 45. 21 Ed. 4. 29. And afterwards, this Term, being again moved by Rolls for the Plaintiff, Brampston agreed with Jones and Berkeley, that this Release by an Infant shall not barr, because the Infant being Executor, by course of Law is to have the benefit of the forfeiture of the Bond, and the intire sum in the Bond is a Debt due to the Executor; and when the Infant, being but one of the Executors, takes part of the money only (although it be all which was due in conscience) yet this Release shall not barr him; but

2 Cr. 719. Co. Lit. 172. a.

1 Rol. 730. Moor. 852.

Co. Lit. 172. a.

but if he will take all the money, and make a Releaſe, then it is good: And if the Defendant would have remedy, he is to have it in a Court of Equity, and cannot plead this releaſe in barr at the Common Law: Whereupon Rule was given that Judgment ſhould be entred for the Plaintiff, unleſs other cauſe were ſhewn upon the Thurſday following. And afterward, this Caſe being moved at the Table in Serjeants Inn Fleetſtreet, Damport chief Baron and Baron Denham agreed, that this Releaſe, without payment of the intire ſum, conteined in the Bond (it being forfeited) was not any barr to the Infant: But Brampton chief Juſtice and Damport chief Baron agreed, That ſuch Releaſe, by an Executor of full age, upon receipt of the principal money and the Intereſt, ſhall be only *Aſſets* for the intereſt and money received, and ſhall not be a Devaſtavit for the reſidue, becauſe he did that which in good conſcience he ought to do.

The King *verſus* Rooks

SCire facias being ſued in Chancery againſt Thomas Rooks, to ſhew cauſe wherefore his Patent of the Office of Searcher of the Port of Sandwich cum membris, granted to him for life, ſhould not be ſeized as forfeited, becauſe by enquiſition upon a Commiſſion iſſued out of the Chancery, it was found, that divers miſdemeanors were committed by him, to the great prejudice of the King, and forfeiture of his Office. Upon this the Defendant appeared there, and traverſed the points found in the Enquiſition; and thereupon twenty ſix Iſſues were joyned, upon ſo many ſeveral points found in the Office, ſome of them being triable in Kent, other ſome triable by a Jury of Midd. Upon this, the Record being delivered by the Lord Keeper with his own hands, evidence was given at the Bar to a Kentiſh Jury upon ſeventeen of theſe Iſſues, whereof one of them was meerly for his abſence from executing his Office from the tenth of June 10 Car. unto the twelfth of Auguſt following. Unto this, the Defendant pleaded, That he was ſick all the ſaid time, and Iſſue being joyned thereupon, he failed in proof thereof: The proof on the part of the Plaintiff was, That he was well in health at London at that time: This Iſſue was found for the Plaintiff; and to three other ſeveral times of his abſence found in the Enquiſition, he pleaded, That he was in Priſon, and in execution at the Kings Suit, by command out of the Exchequer: And upon theſe three Iſſues, becauſe ſome doubt was conceived, for as much as the Impriſonment was at the Kings Suit, whether that ſhould not excuſe him for his abſence, in regard of the neceſſity, he being committed for debt to the King, and miſdemeanor in his Office. To avoid therefore the Queſtion (there being many other cauſes of forfeiture of his Office) it was conceived

16. R. 272.

2 Cr. 550.

ved the King should not give evidence for them. Two other several Issues were, whether he voluntarily suffered a Ship, laden with several commodities (naming them) to be exported, and other Ships to be imported and unladen, without being searched? And upon the Evidence it appeared, that such a Ship was imported and unladen, and others also were exported beyond Seas, not being searched: But these were so imported and exported, when neither himself or any of his Deputies were there: So it appears not whether it was by negligence or voluntarily; For he did not know of them, and so not within that Issue. But all the Court held, That this voluntary absence and neglect, so as neither himself nor Servants were there to search, is not only Crassa negligentia, but a voluntary permission; As if a Goaler should leave his Prison doors unlocked, and the Prisoners escape, it is not only a negligent, but a voluntary escape: So here, *&c.* whereupon the Jury found this Issue against the Defendant. Another cause of forfeiture of the said Office was in issue, viz. That he seized divers goods forfeited, for not being customed, and accounted not for them to the King, but converted them to his proper use. To this he pleaded, that he seized them, and was ready to account, and traverseth the Conversion; And upon the Evidence it appeared, that he seized them as forfeited, and never tendered to account, nor brought them into the Exchequer, nor signified in the Exchequer what they were (as he ought to have done) but he himself sold them at London, which was a clear Conversion; whereupon this Issue was also found against him.

Co. 9. 50 a.

Herbert *versus* Laughluyn. Pasch. 12 Car. rot. 388.

17. ERror of a Judgment in the Kings Bench in Ireland, in an Eject one firmæ. The principal Error insisted upon was, that this Ejectione firmæ is brought de piscaria in such a River. And because it was not terra, aqua cooperta, nor of any land, but only of a profit *apprender*, all the Court (absente Brampston chief Justice) held, that an Ejectione firmæ lies not thereof, no more than of common *apprender* or rent; where fore for this Error the Judgment was reversed. But Jones said, that peradventure an Assise would lie of such a Piscarie, because it is proficuum in certo loco capiend. But he cannot maintain an Ejectione firmæ.

Ant. 362. 2 Cr. 146. R. 185.

The Case of Foulwood & Bowen. Cujus principium ante. pag. 482, 484, 488.

18. THey being brought to the Barr, and demanded what they could say, why Judgment should not be given against them, answered, that they had not any more to say. And the Court, being

ing full, resolved, that Judgment should be given. Justice Jones pronounced it, and said, that although it had been objected, and was divulged, that it was an obsolete Statute, and it would be hard, if any should be condemned thereupon; he thereto answered, That they were deceived; for it is a good Statute and in use, but many had not been executed thereupon, because they had their Clergie, for the taking whereof away, the Statute of 39 Eliz. cap. 9. was made, and some have been since hanged; and within these ten years one Thorold was endicted and arraigned at Newgate upon this Statute, for the taking of Mistress Havers, an Orphan, against her will, and marrying her; but he obtained his pardon, and avoided the conviction by this means. And whereas it is here pretended, that Sarah was married with her consent, and therefore not within the Statute, he said (and we all consented thereto) That the taking being unlawful and against her will, although the marriage was with her will, yet it is felony within the Statute: And they all held, although this was not a Marriage de jure, because she was in such fear (as she affirmed upon her oath) that she knew not what she answered or did; yet it is a Marriage de facto, and is felony within the Statute; Wherefore Judgment was given, that they should be hanged. 3 Inst 62.

Termino

Termino Hillarij, anno decimo tertio *Caroli* Regis, in Banco Regis.

Kellend *verſus* Whyte. Trin. 13 Car. rot. 1626.

1. Jones 402.

EJectione firmæ of a Leaſe made by John Arundel to the Plaintiff. The Defendant pleaded, that long time before the Leſſor had any thing to do, I. W. Grandfather of the Defendant, was ſeized in Fée of that Land, holden in Socage, And deviſed it to T.W. his ſon (the Defendants father) in tail; who entred, and died ſeized; which deſcended to the Defendant; Whereupon he entred and was ſeized in tail, until the ſaid John Arundel entred upon him and diſſeiſed him, and let to the Plaintiff. The Plaintiff confeſſeth the ſeiſin of J. W. and the deviſe in tail. But pleads a fine with proclamation to bar this entail, and conveys title to the Leſſor of the Plaintiff. And upon this Plea the Defendant demurred. And Maynard ſhewed the cauſe to be becauſe the diſſeiſin is the material part of the barr, and the intail is but an inducement thereto; and therefore he ought to confeſs and avoid the diſſeiſin alledged, or traverſe it. But Rolls, for the Plaintiff, maintained the Replication, becauſe it conveys an eſpecial Eſtate to the Defendant, and a deſcent thereby, And it ſufficeth to avoid that entail alledged. And in proof thereof, he relyed upon Heliars Caſe, Co. lib. 6. fol. 24. But all the Court (abſente Brampſton) held, that this Replication is vitious; For it is but argumentative, and is no expreſs confeſſion and avoidance, and it ought to anſwer the material part of the barr, which is the Deſſeiſin; And he ought not anſwer unto it by argument: And it is not like Heliars Caſe; for there both claimed the ſame Term, which cannot be gained by any, unleſs by Grant, and there entitling himſelf by a former Grant from the ſame perſon, by whom the Defendant claims, It is a good confeſſion and avoidance of the laſt aſſignment: Whereupon it was here adjudged for the Defendant.

R. 395. Ante 324. 2 Cr. 44.

Perry *verſus* Diggs. Trin. 13 Car. rot. 402.

2. 1 Rol. 6.

ERror of a Judgment given at Marlborow. Where the Plaintiff declared in an Action upon *Trover* againſt *Baron* and *Feme*, That they converted ad uſum ipſorum; and, after Verdict, upon Not guilty pleaded, and Judgment for the Plaintiff, the Error here aſſigned was, that the Declaration was not good: becauſe a *Feme Covert*

Covert, with her *Baron*, cannot convert to the use of the *Feme*, but all is done to the use of the *Baron*: wherefore for this cause it was reversed. Ante 254. 2 Cr. 5.

Reeve *versus* Digby. Trin. 13 Car. rot. 303.

ERror of a Judgment in the Common Bench, in an Action upon the Case, for the disturbance of using his Common in a certain place called The Lakes, and shews the prescription of Common, And the disturbance by digging 40000. Turffs, and making of a Fish-pond. The Defendant pleaded, that he was Lord of the Manor, and improved the said several parcels, according to the Statute, leaving sufficient Common in the residue. Issue being thereupon, the Jury found, quoad the parcel where the digging of the 40000. Turffs was, That the Defendant had not left to the Plaintiff sufficient Common, and assessed damages five shillings and costs. And quoad the digging of the Fish pond, That the Defendant had left unto him sufficient Common. And upon this Verdict Judgment was given for the Plaintiff for the first, which is directly found against the Defendant: And for the other part, for digging of the Fish-pond, Judgment was for the Defendant, and the Plaintiff in misericordia: And hereupon the Error assigned was, that this Verdict was repugnant, to find that he had not sufficiency of Common, and that he had sufficiency of Common: Wherefore the first finding for the Plaintiff is good; and the finding of the second, which is repugnant, is void. And the Judgment being for the Defendant for part, is erronious. And of that opinion was Berkeley, because it is one intire Issue. But I held, that the Verdict is good enough; for it is in diversis respectibus; and it may be, he had sufficient Common notwithstanding the Fish-pond, and had not sufficient, in respect of digging the Turffs: So the damages to the Plaintiff is only by reason of the digging of Turff. And Jones doubted thereof. Per quod Adjournatur. 3.

Hughes *versus* Bennett. Trin. 13 Car. rot. 1536.

COvenant. Upon demurrer the case was Edward Bennet Covenants, in consideration of a Marriage of his son John Bennet, with Elizabeth the daughter of Hughes, and such a portion to be paid, to stand seized of such Lands to the use of the wife for life, and to the use of the son in tail, and Covenants in the said Indenture in form following, viz. that he was seized in fee of those Lands of a lawful Estate in fee, notwithstanding any act done by him, &c. And, That the said Lands were of the annual value of 200 l. *per annum*, 4. Jones 403. 2 Ro. 249.

num, ultra Repriſas. The Defendant pleaded, that they were of the value of 200 l. per annum, notwithſtanding any Act done by him. And hereupon the Plaintiff demurred. And it was argued by Lane for the Plaintiff, and by Rolls for the Defendant. And after Argument at the Barr, all the Court reſolved, That theſe words, Notwithſtanding any Act, &c. do not refer to the ſecond Covenant, but only to the firſt part: But the value is properly in the conuſance of the Covenantor. And it was his intent, that ſhe ſhould have a Joynture of the annual value of 200 l. abſolutely: And it is not proper to ſay, that for any thing by him, &c. it ſhould be of ſuch a value; but abſolutely, that it ſhould be of ſuch a value: Whereupon it was adjudged for the Plaintiff.

Ante 107.

R. 30.

Termino

Termino Paſchæ, anno decimo quarto *Caroli* Regis, in Banco Regis.

Hall *verſus* Marſhall. Mich. 13 Car. rot. 41.

ERror of a Judgment in the Common Bench, in Aſſumpſit. Whereas the Defendant, in conſideration of 130 l. paid and ſecured to be paid, bargained and ſold unto him, ſeptimo Martij, nono Caroli, anno 1634. all the Furzes growing upon ſuch a parcel of Land, to be taken before Mich. 1635. That the Defendant, in conſideration, &c. aſſumed to the Plaintiff, that he ſhould peaceably permit him to enjoy the ſaid Furze, and quietly to carry them away without diſturbance; And although the Defendant had permitted him to carry away fifty loads of the ſaid Furze; yet he did not permit him to enjoy all according to his promiſe; but diſturbed him from taking 1000 Loads of them, which were growing upon the Land at the time of the Bargain. Upon Non aſſumpſit pleaded, and found for the Plaintiff, and Judgment given in the Common Bench. The Error aſſigned was, becauſe he doth not ſhew the certain time of diſturbance, whether it were before Michaelmas 1635. otherwiſe there is no cauſe of Action. But all the Court reſolved, That this is no cauſe of Error; for being after Verdict, it is intended, that it was within the time, the Defendant having pleaded Non aſſumpſit, and the cauſe of the damage appearing upon the Trial, otherwiſe there had been no cauſe to have damages: And it is not material that the time of the diſturbance ſhould be alledged in the Declaration; for it is collateral to the promiſe: Wherefore the Judgment was affirmed. 1. Ante 420. 209.

James *verſus* Tutney. Hill. 11 Car. rot. 753.

ERror of a Judgment in Replevin, in the Common Bench. Where the Defendant made Conuſance as Bayliff to Sir John Stowell, for that the ſaid Sir John Stowell was ſeized in Fee of the Manor of Somerſon, whereof a great Waſte called Kinſmore is, and from time whereof, &c. was parcel. And that the ſaid Sir John Stowell, and all thoſe whoſe Eſtate, &c. 2. 1 Rol. 365. 6. 2 Rol. 136. Jones 421.

have had, time whereof, &c. in the said Moor a Court to be holden twice every year by the Steward of the Manor, in which Court, upon reasonable Summons, all the Commoners within the said Common have used to appear, or to be amerced: And that within the Manor is such a Custom, That the Steward should out of the Commoners, choose a Jury to inquire of all Purprestures and Misfeasances within the said Common; And that the said Jury had used to make Ordinances concerning the well using the Common; And that all those who had Common, had used to be obedient to the performance of those Ordinances, under a reasonable pain to be set down by the Jury: For which pains forfeited, the Lord of the Manor hath used, time whereof, &c. to distrain; and alledges in facto, That at such a Court a By-law was made by such, being Jurors, whereby it was ordered, That no Commoner should keep any Sheep in the bounds below the Weer, under the pain of three shillings four pence. And for keeping Sheep against the said Ordinance, and the penalty forfeited, the distress was taken. And upon this conusance the Plaintiff demurred. And Judgment being given for the Avowant, Error was brought: And now Bear assigned for Error, first, That this was not a good By-law to bind one for his Inheritance. But all the Court held, That an
1 Rol. 365. Ordinance by custom for the Government of the Common is good; And this is not to take away the Inheritance, but for regulating the Common. Vide 15 Eliz. Dy. 314. Co. 5. 62. 21 H. 7. 40. Secondly, Because he doth not shew, that the Plaintiff had notice of this Ordinance. But it being proclaimed in Court, as 'twas al-
1 Rol. 365. ledged in the Plea, he, being a Commoner, is bound to take notice thereof; for none else is bound to give him notice. Thirdly, Because costs are given in this Case to the Defendant; And it was said, that it is out of the Statutes of 7 H. 8. & 21 H. 8. being a Distress for a penalty. And of that point the Court would advise. Vid. Residuum 532.

The King *versus* Heyward, and two others, his Sureties.

3. SCire facias upon a Recognisance of the good behaviour. The Breach was assigned, Because Heyward said to a Constable, in executing his Office, Thou art a lying Rascal. Secondly, Because he said to another who threw down his Hedges, One of you is dead of the Plague, and I hope I shall see more of you to dye of the Plague. Thirdly, Because he said to a woman, That she was an Whore and Jade, and other fowl words concerning her incontinency. Fourthly, Because he said to one in the Church-yard, after Evening-prayer, That he was a forsworn Knave, and a perjured Knave. The Defendant pleaded Not guilty. And upon evidence at the Bar, it appeared by one witness, that he spake to the Constable,

ſtable, becauſe he affirmed, that the Defendant uſed to carry Pick-locks about him, Thou art a lying Raſcal. And the other witneſſes on the behalf of the King, did not prove, That theſe words were in diſturbance of the execution of his Office, or for any act about the executing of his Office. And for all the other words, they were words of heat and intemperance; But none of them tended to the breach of Peace, or to the terrour of any, nor was there any act done, but only evil words, And of thoſe words, the perſons againſt whom he ſpake them, gave the occaſion. And although the manner of ſpeaking may be good cauſe in diſcretion, to bind one to his good behaviour; yet one being bound, words only, which tend not to the breach of Peace, or terrifying others, or unto Sedition, &c. ſhall not be ſufficient cauſe of forfeiture of a Recogniſance; For then, by ſuch pretence of words a man ſhould be in danger of his Recogniſance, which would be inconvenient. Wherefore it was left to the Jury to conſider of the verity and validity of the Evidence, and of the manner of ſpeaking them. Whereupon, they being a ſubſtantial Jury, conſidering thereof, gave their Verdict for the Defendant, That he was not guilty. Vide 2 H. 7. 2. 22 Ed. 4. 35. 18 Ed. 4. 28.

The King and Informer *verſus* Fredland.

ERror of a Judgment in London. Upon an Information upon the Statute of 5 Eliz. for uſing a Trade wherein he was not brought up as an Apprentice for ſeven years, viz. for uſing the Trade of an Hempdreſſer. And for this the Error was aſſigned, and all the Court held, That this is no ſuch Trade as is within that Statute; For it is not a Trade requiring much learning or ſkill, And every Husbandman doth uſe it for his neceſſary occaſions, and it is not within the words or intent of the Statute. And Jones ſaid, He much doubted of the uſing the Trade of Baking and Brewing. But it was thereto anſwered (to which he agreed) That it extends only to common Brewers and common Bakers, and not to any who brew or bake in their private houſes; whereupon Rule was given, (abſente Brampſton) That Judgment ſhould be reverſed, unleſs cauſe, &c. Note, this was without argument, being conceived to be a clear Caſe. 4°

Moor 886. Hob. 183. 2 Cr. 178. Co. 8. 130. a. Co. 11. 54 a.

Anonymus.

ACtion upon the Caſe, for diverting of an ancient water-courſe, qui currere conſueviſſet & debuiſſet to his Mill. After Not guilty pleaded, and found for the Plaintiff, it was moved by Rolls

5 Co. 1 Roll. 275. 2 Roll. 13. 1 Cr. 130.

in arreſt of Judgment, That the Declaration was not good, be-
Co. 4. 84 b. cauſe he doth not ſhew any title to the water-courſe by preſcription
or otherwiſe. But Grimſton for the Plaintiff argued, That the
Co. 10. 59. b. Declaration was well enough; For being alledged, that it is anti-
Hob. 44. quus Aquæductus, And that by it the water currere conſueviſſet &
debuiſſet, it compriſeth in it ſelf ſufficient title, eſpecially againſt a
Poſt. 575. ſtranger who diverted it: And all the Court being of that opinion,
it was adjudged for the Plaintiff.

Afterwards the ſame day, another Action upon the Caſe, for di-
verting an ancient water-courſe, qui ad terram *le Plaintiffs* currere
conſueviſſet & debuiſſet, to water his Land, and for his Cattel to
drink. After Verdict for the Plaintiff, Serjeant Henden took the
ſame exceptions, and the ſame Rule was given againſt him.

Termino

Termino Trinitatis, anno decimo quarto *Caroli* Regis, in Banco Regis.

Nevison *versus* Whitley.

DEbt upon an Obligation of 100 l. dated 12 Julij, 10 Car. with condition for the payment of 58 l. at the end of six Months. The Defendant pleaded the Statute of 21 Jac. of Usury, which makes such an Obligation to be void, &c. The Plaintiff replies, That he lent the fifty pounds for a year, and that the Defendant should pay eight pounds for the forbearance for a year, and that the Plaintiff should not demand it until the end of the year; And, by the Scriveners mistake, it was made payable at the half years end; and he, not knowing thereof, accepted of the said Bond: Wherefore, &c. The Defendant rejoyns, That the lending was only for half a year, and that he was to pay for it eight pounds for that time, and traverseth, That upon the said 12. of July, it was agreed the loan should be for one intire year, Or that he should forbear it for a whole year. And hereupon the Plaintiff demurred: And Rolls for the Plaintiff shews, That the bar was ill, because it was not pleaded, Quod corrupte aggreatum fuit, &c. for so is the course of pleading. And the Plea is, That he should have for Interest for forbearing; And he doth not say corruptè, &c. And for this cause the Court (absente Brampston) held, That the bar was ill, And that the Replication is well enough. Secondly, It was objected, That this allegation is against the words of the Condition. But all the Court held, he might well make such an allegation; For it is the shewing of the true agreement, That no interest was to be paid by the said agrément, but such as stood with the Law. Thirdly, Rolls excepted to the Rejoynder, because he makes thereby the day to be parcel of the Issue, which ought not to be, but he ought to have traversed the agrément only; and therefore the Rejoynder to the bar was ill. And this was the opinion of the whole Court: But no Judgment, because the Plaintiff offered to accept his Debt, and the Defendant offered to pay it, &c.

1. Jones 396. 2 Cr. 508. 2 Cr. 678. 2 Vent. 83. 2 Cr. 201.

Lloyd

Lloyd *verſus* Gregory.

2. Jones 405. 1 Rol 728. 2 Rol. 495. EJectione firmæ. Upon ſpecial Verdict the Caſe was. A Leaſe for ninety nine years being made by a Dean and Chapter 1 Ed. 6. to begin at the Feaſt of the Annuntiation, after the end of a Leaſe of fifty years, made anno 35 Hen. 8. This Leaſe being aſſigned to John Shepheard and William Shepheard, Infants of eleven years of age, They, anno 29 Eliz. (which was before the end of the term for fifty years) take a new Leaſe of the ſame Lands from the Dean and Chapter, for the ſame term, and for the ſame rent, and upon the ſame covenants; And after the end of the ſaid term for fifty years, the Infants being of full age, enter, and hold by that ſecond Leaſe, and pay the rent accordingly to the Dean and Chapter, which they accept for divers years: And afterwards a new Dean and the Chapter cauſe an entry to be made, to avoid this Leaſe, and let it to the Defendant, who entred and *ouſted* them who were Infants, and made a Leaſe to the Plaintiff, &c. This was argued by Whitwick for the Plaintiff, and by Maynard for the Defendant. The firſt queſtion was, Whether an Infant may ſurrender a future intereſt by the taking a new Leaſe; For if he had 2 Co. 61 a actually ſurrendred, it had been void, being but an intereſt of a Term; And for that point, all the Court held, that a ſurrender by an Infant cannot be by Deed, but it is abſolutely void; and that a ſurrender by acceptance of the ſecond Leaſe is void, becauſe it is without increaſe of his term, or decreaſe of his rent; and where there is not an apparent benefit, or the ſemblance of a benefit, his Acts are meerly void, and here is no benefit or appearance of any to the Infant, for he hath no manner of advantage thereby, but cauſe of quarrelling by this Leaſe. Secondly, Whereas it was objected, That it doth not appear, that the Infants had a Leaſe for ninety nine years; for it is miſrecited in the Grant, viz. the Grant mentions the Leaſe for ninety nine years to commence ad Feſtum Annuntiationis, after the Leaſe for fifty years be determined, and it ought to be à Feſto Annuntiationis. The Court held it to be all one, for there ſhall be no fraction of a day, and it ſhall begin inſtantly from the determination of the former Leaſe; and it is not like the Ante 399. Caſe of Millward and Manwaring, Where there was a recital, That a Leaſe was made 28 Hen. 8. for years, and that Leaſe was granted, &c. whereas in truth it was dated 27 Hen. 8. For there is a whole years difference, and no ſuch term; Wherefore it was adjudged for the Plaintiff.

Arundel *verſus* Sanders, Hill. 13 Car. rot. 1266.

3. 1 Rol 537. TReſpaſs upon the Caſe, brought by Bill in the Kings Bench, ſuppoſing, That the Defendants Father held of him ſuch Land

Land by Knights service, and died in his Homage, his Heir within age; and that he tendred unto him a convenient Marriage, and shews what, &c. and demanded of him the value of the Marriage, &c. The Defendant Protestando to the Tenure pro placito, traverseth the Tender, &c. And hereupon the Plaintiff demurred, and it was resolved, that the Plea was ill; for the Tender is not traversable. But Bear for the Defendant moved, that the Declaration is ill, because he declares in an Action upon the Case, where it ought to be in valore Maritagij. And the Court doubted of this point because there is an especial original Writ de valore Maritagij. But Jones conceived, that Action upon the Case is maintainable. As an Action upon the Case lies for an Escape, as well as Action of Debt; so here it may be the one way or the other. Another Exception was taken to the Declaration, because it is not shewn, that the Ancestor was seized in fee of the Land supposed to be held, &c. And that was conceived to be a material exception. Et adjournatur.

2 Cr. 66. 150. r. Co. 5. 127. b.

Ante 142.

Middlemore *versus* Goodale.

4.

COvenant. Whereas the Defendant by Indenture enfeoffed J. S. of such Lands, and covenanted for himself and his Heirs with the Feoffee his Heirs and Assigns, to make further assurance upon request: which Lands J. S. conveyed to the Plaintiff, who brings this Action, Because the Defendant did not levy a Fine upon the Plaintiffs request. The Defendant pleaded release from the said J. S. with whom the first Covenant was made, and it was dated after the commencement of this Suit; and thereupon the Plaintiff demurred, and all the Court agreed, That the Covenant goes with the Land, and that the Assignee at the Common Law, or at leastwise by the Statute, shall have the benefit thereof. Secondly, They held, that although the breach was in the time of the Assignee, yet if the release had been by the Covenantee (who is a party to the Deed, and from whom the Plaintiff derives) before any breach, or before the Suit commenced it had been a good bar to the Assignee, from bringing this Writ of Covenant. But the breach of the Covenant being in the time of the Assignee, for not levying a Fine, and the Action brought by him, and so attached in his person, the Covenantee cannot release this Action, wherein the Assignee is interessed; Whereupon Rule was given that Judgment should be entred for the Plaintiff, unless cause was shewn to the contrary by such a day. V. de residuum postea, pag. 505.

1 Rol. 521. 2 Rol. 411.

2 Cr. 511.

1 Rol. 521. Ante 137, 138. Co. Lit. 215 a. R. 183.

Thomas Harrisons Case.

5.

THomas Harrison was endicted; for that 4 Maij, 14 Car. the Courts of Common Bench, Kings Bench, and Chancery, sitting, he rushed to the Bar of the Common Bench, and in disturbance of the Justices, and of the Court, and administration of Justice,

Hutt. 131.

Justice, and against the King, and his Regal Majesty palam & publicè & malitiosè, intending to draw Justice Hutton, one of the Justices of the Common Bench, into displeasure of the King, and of other his Subjects, and to bring him into danger of his life, and forfeiture of his life and goods, spake these words of him, the said Justice Hutton, in the presence and audience of the Justices there
175. sitting, I accuse Mr. Justice Hutton of High Treason: He being hereof endicted, pleaded Not guilty, and by a Jury of Knights and Esquires was found guilty; He confessing that he spake those words purposely and openly, because Judge Hutton in his Argument in the Exchequer Chamber maintained, that the King might not charge his Subjects to find Ships, and that therein he denied his Supremacy: And also, that by this means he stirred up the Subjects to sedition against the King. And being hereupon found guilty, the Judgment was, That he should pay a Fine to the King of 5000 l. and be imprisoned during the Kings pleasure, and should have a Paper upon his head shewing his offence, and go therewith to all the Courts of Westminster, and make his submission in every Court in Westminster-Hall, and in the Exchequer; for it is an offence to every Court. And it was informed by Keeling Clerk of the Crown, That Imprisonment during the Kings pleasure is usually entred, and not Imprisonment during life, but where there is an awarding of forfeiture of Lands during life.

The Marquis of Winchesters Case.

6. ERror to reverse a Judgment for the King upon an Endictment
Jones 409. against him by the name of Lord St. John, for Recusancy, for his absence from Church for two months; whereupon he appearing, and pleading Not guilty, it was found by Verdict, That he was guilty for the absence of one of the months, parcel of the time, and not guilty for the other month; Wherefore it was adjudged, That he should forfeit twenty pound, and for the other month eat inde sine die; And the Kings Attorney signified his Majesties pleasure, That if it were erronious, it should be reversed; and Rolls assigned divers Errors; First, That the Endictment is apud Castrum Winton, and he doth not say in what County or Parish Winton is. Secondly, It is coram John Finch, &c. Justiciariorum de Gaila deliberand. and he doth not say, Justiciariorum ad Assisas et ad Gailam deliberandum. Thirdly, Because the Endictment is against him by the name of Dominum St. Johns, without other addition. Fourthly, Because the Endictment is Quod non accessit ad A. Ecclesiam Parochialem prædict. And there
Ante 465. is not any Church mentioned before: And the Court held, that none of the Exceptions were material; and it was doubted whether any exception be good upon conviction of Recusancy; For the Statute of 3 Jac. is precisely, That it shall not be void or discharged for default of form, or other matter, until after conforming himself by coming

coming to the Church. But afterwards, because the Judgment was not Ideo capiatur, and the omission thereof is apparent to the Kings prejudice, And for that, upon every conviction in Endictment, the Judgment is Quod capiatur, for this cause the Judgment was reversed. Co 8 59 a. 2 Cr. 211.

Middlemore *versus* Goodale. Ante pag. 503.

WAs moved again by Bear for the Defendant, and he took exception to the Declaration, that it was not good, because he brings the Action, as Assignee of Assignée of the Covenantée, and shews, that the conveyance was made to the Plaintiff, and Frances his Wife, and to the Heirs of the Husband; and he brings the Action sole without naming his Wife, who is yet alive; so it is not good; for he ought to have joyned his Wife with him in the Action. And of that opinion was all the Court (absente Brampston) Whereupon Judgment was given for the Defendant, Quod querens nihil capiat per Billam. 7. Jones 406. 1 Rol. 348. Anre 438. 2 Cr. 399. 1 Rol. 348.

Mann *versus* the Bishop of Bristoll, Robert Hide and Richard Hide Incumbent. Pasch. 14 Car. rot. 467.

QUare impedit in the Common Bench, for the Church of Wooton Fits payn in the County of Dorset. The Plaintiff entitles himself to the Advowson, for that Margaret Chubb was seized in fee of the Manor of Wootton Fits-pain, ad quod the Advowson was appendant, and upon 12 Septemb. 20 Jac. let it to Robert Cook for years, a die datus, that 13. Septemb. 20 Jac. he entred and was possessed, and that Margaret by Indenture 13. Sept. 20 Jac. granted the Reversion to William Bishop and others, to the use of the said Margaret for her life; and after to the use of Joan Cook and the Heirs of her body. That afterward Margaret died, and Joan entred, and levyed a Fine to the said John Mann of the said Manor, ad quod, &c. Whereupon at the next Avoidance the Plaintiff presented, &c. The Defendant Robert Hide confesseth the seisin in fee of the said Margaret, & that she infeoffed him of the Manor, ad quod &c whereby he presented, &c. and traverseth the grant of the Reversion, modo & forma, &c. and Issue thereupon. Richard Hide, as Incumbent, pleads and intitles himself; for that Margaret Chubb being seized in fee 4 Aug. 19 Jacobi, by her Deed granted to Robert Jacob the first and next Avoidance; and that Robert Jacob died and made such a one his Executor, who granted the next Avoidance to the said Hobert Hyde, who presented thereto the Defendant Richard Hyde. The Issue was upon this, Non concessit: The Jury upon these Issues found a special Verdict. For the first, they find the Lease and Grant of the Reversion; and that it was to the use of the said Margaret, during her life; and after to the use of Robert Cook, until Joan Cook came to 8. Jones 407. 2 Rol. 49.

the age of twenty one years: and after to the use of Matthew Chubb and Joan Cook, and the Heirs of the body of Joan, by the said Matthew to be engendered; and after to the use of the said Joan and the Heirs of her body; and after to the use of Robert and his Heirs. And they find, that Joan accomplisht her age of twenty one years before this Action brought, and that Matthew died without Issue of the body of the said Joan, And that upon 4 Aug. 19 Jacobi, Margaret granted to the said Robert Jacob, durante vita ipsius *Roberti*, primam & proximam advocationem *&c.* and that he died before the Church became void; and whether this were an absolute grant of the next avoidance, as it was pleaded, or not, was the question? And it was adjudged in the Common Bench for the Plaintiff, Quod non: And this Judgment was here affirmed; For it is not an absolute grant of the next Avoydance, but it is limited unto him to present to the Advowson, if it becomes void during his life, and not, that otherwise it should go to his Executors. Secondly, It was moved by Holborn for the Plaintiff in the Writ of Error, that the Issue being upon the grant of the Reversion, whether it were granted modo & forma prout? The Verdict found, that it was granted to the use of Margaret for life; and after to the use of, *&c.* ut supra. And although it be found, that the Estates were determined before the Action brought, yet it should have been shewn; For there is no such Grant, modo & forma prout. But it was argued by Grimston for the Defendant, That these Estates being determined, need not be mentioned, especially in this possessory Suit, The question being only for an Avoydance fain; And although the Travers be found, Quod concessit modo & forma, that extends not to the uses limited, but non concessit Reversionē modo & forma prout, and it is found Quod concessit Reversionem modo & forma, and the Estates determined, need not be mentioned, as 14 Ed. 4. 1. Feoffment to three, the one dies, it may be pleaded to be made to the Survivors, not mentioning him that is dead; and all the Court being of that opinion, Judgment was affirmed.

Evans and Cottingtons Case.

9. EVans and Cottington, and seven others, were endicted for a grand Riot, that they, with others there named, to the number of one thousand persons, made a Rescous and Assault upon Henry Smith a Bayliff, who by virtue of a Warrant upon a Bill of Middlesex, against William Cleer, had arrested him, and was carrying him to Prison, and they procured him to escape. The Arrest was at Charing-Cross in the Parish of St. Martins in Middlesex; and after the Arrest, they assaulted the Bayliffs, and beat them; and the Bayliffs putting the Prisoner into an house for safe keeping against the Tumult, they assaulted the House; and notwithstanding a Justice of peace, assisted with three Constables made proclamation

clamation for keeping the peace and for their departure, yet they continued their assault, breaking open the house, and with ladders taken from the Kings house at White-hall (where the King with his Court were resident) upon the twenty fourth of March 13 Caroli, in the afternoon of the said day, made this Riot and Rescous, and carried the Prisoner away through the Kings house, and caused him to escape. Upon this Endictment nine of them being arraigned pleaded Not guilty, and four of them, viz. Evans, Cottington, Thomas Groom, and Heatley, being arraigned, were found guilty, and five of them were found not guilty; but against three of them was probable Evidence, that they were aiding to this Riot and Rescous; but the Jury acquitted them; Wherefore because it was so great a Riot and Offence, being committed so near the Court, it was adjudged, That the said four persons, which were so convicted, should be committed to Prison, and every of them should pay 500 pound fine to the King, And that every of them should stand on the Pillory at Westminster and Charing Cross, where the Riot was done; And that Thomas Groom, who was a Cobler, and entred into the house with a drawn Sword and a Kettle upon his head, as an Hemlet to defend himself, should stand upon the Pillory with a Sword in his hand and a Kettle upon his head, and should be bound with good Sureties for their good behaviour, before they should be delivered: And the three which were acquitted, against whom was such probable Evidence, were bound to find Sureties for their good behaviour.

Thomas Barkhams Case.

ONe Thomas Barkham, upon an Habeas Corpus awarded to the Warden of the Fleet, was brought to the Barr, and it was returned, That he was committed 11 Novemb. 1637. by Warrant from the Lords of the Councel to the Fleet, to remain there until other order given; And for that there was not any cause of commitment mentioned, either in the Mittimus or Return, the Court conceived he ought not to be detained in Prison; whereupon he was Bayled. 10. Ante 133. Post. 579. 593. 1 Cr. 81. 219. Post. 552.

Lawsons Case.

ONe Lawson at the same time, upon another writ of Habeas Corpus to the Warden of the Fleet, and returned, That he was committed 4 Maii 1638. by the Lords of the Councel, and no cause shewn, was therefore let to Bayl. 11.

Smith *versus* Smith

ASsise of a Rent-seck in the County of Cambridge. Upon a special Verdict the Case was, That a Rent-seck was gran- 12.

ted of foure pound per annum by John Smith to Nathaniel his Son in fee, issuing out of an house called the Unicorn, in Lynton, payable at the Annuntiation and St. Michael, at the house of the said Nathaniel, in Lynton, to begin at Michaelmas after his decease, and gave six pence in name of Seisin, And for rent due at the Annunciation 1637. and six years before, and not paid, &c. The Jury find the grant of the rent and seisin given, and the demand at the said house called the Unicorn, at the said feast of the Annuntiation 1637. and that none was there to pay it; And whether this were a disseisin for the Rent arrear, was the question? The doubt was, whether it were a good demand for the Rent, at the feast of the Annuntiation, at the house out of which it was issuing, and not at the house where it was payable: And it was resolved by the chief Justice and by my self, being Justices of Assise, after advice had with other of the Judges, who were of the same opinion, that it was a good demand, and a disseisin for not payment; and that this gift of six pence in name of seisin was good seisin: And the Jury found all in damages, viz. twenty foue pound, not mentioning it to be for Arrerages of rent; and it was well enough, for the Precidents warrant both wayes; whereupon it was adjudged for the Plaintiff. Vide Cok. Litt. 153.b. Cok. 7. fol. 18. 29. a. and the Book of Entries fol. 78. & 79. Hill. 45 Eliz. rot. in Com. Banc. Midd. Assise for a Rent-seck.

Pl. Com. 71. a. Co. 4. 73. a. Post. 521.

3 Cr. 324. Co. Lit. 202. a. Littl. Sect. 235

Termino

Termino Trinitatis, anno decimo quarto *Caroli* Regis, in Banco Regis.

Anonymus.

TResPas ..... against *Baron* and *Feme*, for breaking his Close. After Verdict for the Plaintiff, the *Baron* died betwixt the day of the Nisi prius, and day in Banco. And now Archibald moved, That no Judgment should be entred: For the *Baron* being dead, the Action quoad her, by the act of God, is abated: And for that cited 6 Ed. 3. 295. 11 H. 7. 6. And it was held by all the Court, that the death of the Plaintiff or Defendant, after Verdict by Nisi prius and before the day in Banco, shall abate the Writ or Bill. And although *Baron* and *Feme* be but one person in Law; yet, for as much as the *Baron* is dead before the day in Banco, no Judgment may be entred; And if it be entred, it is Error. But because this is in an Action of Trespas which is but personal, and is joynt and several, the Court doubted: For it is clear, If the *Feme* had been dead, and the *Baron* survived, Judgment should have been entred against him. And the reason is the same, that the surviving should be chargeable for the Trespas. But whether the Bill shall abate, the Court would advise, per quod adjournatur. 1. Post. 574. 2 Cr. 19. 356.

Ceely *versus* Hoskins, Hill. 13 Car. rot. 696.

ERror of a Judgment in the Common Bench in an Action for these words, thou art forsworn in a Court of Record, and that I will prove. After Verdict upon Not guilty and found for the Plaintiff, the Defendant there moving that these words were not actionable, and Judgment being there given for the Defendant, a Writ of Error was brought and assigned in point of Judgment. And now Rolls for the Plaintiff, in the Writ of Error, moved to have the Judgment reversed, because the words are very slanderous; and as much, as if he had said, He was a perjured person. But Maynard for the Defendant, in the Writ of Error, said, That it had been much debated in the Common Pleas, and the Court there agreed, That the Action would not lye; and he conceived the reason to be, Because he did not say, in what Court of Record he was forsworn; Not that he was forsworn in giving any evidence to any Jury: And it may be that he intended only, that he was forsworn, not judicially, but in ordinary discourse in some Court 2. 1 Ro. 42. 774.

Court of Record. But Jones, Berkeley and my ſelf, held clearly, That the Action well lay; and ſuch forraign intendment as Maynard pretended, ſhall not be conceived; And it ſhall be taken that he ſpake theſe words maliciouſly, accuſing him of perjury, and for a falſe Oath taken judicially upon judicial proceedings in a Court of Record, and ſhall be underſtood according to the common ſpeech and uſual intendment: as to ſay, Such one is a murtherer (not ſpeaking whom he murthered, or when) an Action lies; And it ſhall not be intended that he was a murtherer of Hares, unleſs ſuch forraign intendment be diſcovered or ſhewn in pleading. Wherefore they all held, That the Judgment is erronious. But becauſe Brampſton was abſent, they would adviſe. And afterwards the Judgment was reverſed, and the Plaintiff recovered.

Morley *verſus* Pragnel. Trin. 14 Car. rot. 549.

3. 1 Rol. 88. ACtion upon the Caſe. Whereas the Plaintiff is owner of a common Inn in Eaſtgeſtock, That the Defendant maliciouſly erected a Tallow-furnace, and boyled therein much ſtinking Tallow, to the great annoyance of him and his Gueſts: And by reaſon of ſuch ſtench, ariſing thereupon, many of his Gueſts left his houſe, and many of his Family became unhealthful. Upon Not guilty pleaded and found for the Plaintiff, Germyn Serjeant moved in arreſt of Judgment, that an Action lies not; For he being a Tallow-Chandler, ought to uſe his Trade, which cannot be ſaid to be a Nuſance. But all the Court held, that as the Declaration is penned, the Action is maintainable: For every one ought ſic uti ſuo, quod alienum non lædat: Then when the Plaintiff is an Innkeeper, the Defendant erecting a Tallow-furnace annoyed his houſe with ſtenches, eſpecially by boyling ſtinking ſtuff: And ſo in the Caſe of Tohayle, who erected a Tallow-furnace croſs the Street of Denmark-houſe in the Strand, it was found a Nuſance upon the Endictment, and adjudged to be removed: Whereupon Judgment was here given for the Plaintiff.

Jeffryes *verſus* Payhem. Trin. 14 Car. rot. 528.

4. 1 Ro. 128. 9. Poſt. 516. Ante 192 460. ACtion for theſe words of the Plaintiff being an Atturney, He is a baſe cheating cozening knave, and hath cheated me as never any man was cheated. The queſtion was, whether an Action would lie for theſe words? For if he had not ſhewn, that he was an Atturney, an Action would not have lien; And as it is layed barely without any circumſtance, it doth not appear, that it toucheth him in his profeſſion: And therefore the Court would adviſe.

Droit

Droit d' Advouſon for the King *verſus* Sir John Dreidon. and three others.

THe parties being at iſſue, and put upon the grand Aſſiſe, there iſſued thereupon a Venire facias, to return quatuor Milites, That they, cum ſeipſis, ſhould return twelve others, who, with the ſaid four, ſhould make a Jury returnable octabis Michaelis: And upon the day of Eſſoyns, viz. 16. Octob. 14 Car. the Demandant appeared, and prayed, that the Tenants be demanded. And before Juſtice Berkeley (who only kept the Eſſoyns) the Tenants being demanded, James Turlow, their Atturney, appeared: And the Demandant prayed that their default might be recorded, for they ought to appear in perſon. But Berkeley held, that they might well appear by their Atturney, who was admitted before upon the Record: And afterward he prayed for the Tenants, that they might be eſſoyned; which being contradicted by the Plaintiff, Juſtice Berkeley cauſed the prayer to be entred. And after the four Knights being called appeared, and they were appointed to chooſe others unto them; And there being a queſtion about the number, they were appointed to chooſe twenty unto them, to make a number compleat (as the Clerks ſaid was the courſe.) But now being moved in full Term it was reſolved firſt, that the Tenants may appear by Atturney. Secondly, that the Eſſoyn caſt was not allowable, becauſe the appearance by their Atturney was entred and recorded; And if an Eſſoyn would lye, It ſhould be as well caſt for the Atturney as for the Tenants. And when an appearance by their Atturney is recorded, they cannot at the ſame time be Eſſoyned, wherefore for this cauſe, the Eſſoyn caſt was diſallowed. Thirdly, The queſtion was, Whether this *Eſſuer* of twenty to the four Knights be good, Or whether they ought to chooſe and return twelve only; And if there ought to be twelve only returned, whether the return of twenty makes not the whole return void; Or that it ſhall be good for the twelve, and ſurpluſage for eight? Hereof the Court would adviſe. And whether there might be any challenge againſt any of the four Knights, becauſe no exception was taken againſt them the firſt day? Vid. 15 Ed. 4. 1. 39 Ed. 3. 2. 7 H. 4. 2. 22 Ed. 3. 18. 5. 2 Rol 674. Co. Lit. 159. a. Mo. 67. Co. Lit. 294. a. Mo. 67.

Mulcarry and *verſus* Eyres and others. Mich. 13 Car. rot. 333.

ERror of a Judgment in the Kings Bench in Ireland, in Ejectione firmæ of a Leaſe by the Earl of Tumond of forty Meſſuages, five hundred acres of Land, forty acres of Meadow, two hundred acres of Paſture, one hundred acres of Bogg, and one hundred acres of Bwery, in the Villages and Territories of D. S. and V. Upon Not guilty pleaded, a ſpecial Verdict was found, that the Earl of Tumond, being ſeized in Fée, let it to the Plaintiff for one and twenty years, rendring rent, with condition, that he 6. 1 Ro. 476. 774.

ſhould

should not lett or alien any part above three years; and if he did, that the Lease should be void, and he re-enter. And he let for three years; and so from three years to three years, during the term of his life, if he lived so long. And the Earl, after this assignment accepted the rent due from the Assignee, and notwithstanding re-entred, and made this Lease to the Plaintiff. And the Defendant re-entred. The Questions made in Ireland upon this Lease were, first, whether it were a breach of the Condition? Secondly, whether the acceptance of the rent by the hand of the Assignee, makes it good, and dispenseth with the breach, especially the acceptance being at another rent-day? And it was resolved there, and adjudged for the Defendant. But the Court here resolved, that it was a plain breach of the Condition And the acceptance after might not dispense with the Condition, seeing it was that it should be void: So it was absolutely determined. But then an exception was taken here to the Declaration by Grimston, that one hundred acres of Bogg was not good; for there is not any such word known. But it was held to be an usual word there and well known; and if it were not, yet the Plaintiff might release his demand as to that Land, and have his Judgment for the residue. Another exception taken by him was, Because it was in Villis & Territoriis. But it was held to be well enough; for they be of the same sense; And if not, it is but sur-usage for Territoriis: Whereupon rule was given, that Judgment should be reversed, unless other cause were shewn. And afterwards, being moved again, the Judgment was reversed; and Judgment given for the Plaintiff, Quod recuperet Terminum suum prædictum. And it was moved how Habere facias possessionem should be awarded; And resolved, that there should be a Writ directed to the chief Justice in Ireland to reverse that Judgment, and commanding to award Execution.

Co. 3. 64. b.
Co. Lit. 215. a.
2 Cr. 533.
2 Cr. 533.
Yelv. 118.

Thomas Smith *versus* Richard Cooker. Trin. 14 Car. rot. 1499.

7.
Jones 409.
1 Rol 84.
2 Cr. 102.

ACtion for these words of the Plaintiff, Thou and thy Wife (innuendo the Plaintiff and Agnes his Wife) are both Witches, and have bewitched my Mare, innuendo the Mare of the said Thomas (where it ought to have been the Mare of the said Richard) After Verdict (upon Not guilty) for the Plaintiff, It was moved in arrest of Judgment for the Defendant, because that two cannot commit one Witchcraft. also it cannot be the Mare of the Plaintiff and the Mare of the Defend. as prædicti Thomæ imports. Sed non allocatur; For the words ought to be referred, as they were spoken, viz. That both of them bewitched my Mare; and both refers to each of them, that they had severally committed the offence: For if a man saith to two, you both have murdered J.S each of them shall have his Action severally, and not jointly as 28 Hen. 8. fol. 19. Dyer 18. And for the last words, innuendo the Mare of Thomas, Tho-

1 Rol. 84.

mas

mas is repugnant to the precedent words, &c. Therefore Judgment was given for the Plaintiff.

Anonymus.

8. TResp. of Assault and Battery against *Baron* and *Feme* for a Battery done by the *Feme*; The Defendants being found guilty, the question was, whether a Quod capiatur should be entred against *Baron* and *Feme*? And it was resolved, that a Quod capiatur shall be against the *Baron* only: and Keeling Clerk of the Crown, and Hodsden the Secondary informed the Court, That so were all the precidents, although the wrong is only done by the *Feme*. Ante 407. 2 Cr. 203.

Kemp *versus* Barnard. Hill. 13. Car. rot. 1252.

9. UPon a special Verdict the question was, whether a Lease by the King, under the Exchequer Seal, of Lands usually demised to one for life, Remainder for life, Remainder to a third for life, reserving the usual Rent, shall be good or not? Maynard for the Defendant very much urged, that it could not be, but under the great Seal; for a Freehold cannot pass from the King, but by patent under the great Seal. But all the Justices held, That Leases for life under the Exchequer Seal, being of Lands usually leased, and reserving the antient Rent, are allowable and good for the Kings benefit, that his land shall not lie un-letten. And Jones affirmed, That all the Barons of the Exchequer said, that it was their course to demise as well for life as for years, and it hath always been so allowed; and of their course there, this Court shall take Conusance, as it is in Cok. lib. 2. fol. 16. Lanes Case. And for this cause Rule was given, that Judgment should be entred accordingly, unless, &c. 2 Rol. 182. 2 Cr. 109. Post. 328.

Talory *versus* Jackson. Trin. 14 Car. rot. 187.

10. DEbt upon the Statute 2 Ed. 6. for carrying away his Corn, the Tythes not being set out, 20 Jac. 21 Jac. and so until 11 Car. The Defendant pleaded for the last three years Non debet, and for the residue, the Statute of 21 Jac. of Limitations. And hereupon the Plaintiff demurred, and the Record being read, all the Court held, That the Statute doth not extend to this Action; Whereupon Rolls for the Defendant moved, that the Demurrer should be waved, and they would plead Non debet for all: But the Court said, It could not be without the Plaintiffs consent. R. 219. R. 148.

Sir John Fitzherbert *versus* Sir Edward Leech.

11. ERror in the Exchequer Chamber of a Judgment given in an Ejectione firmæ in the Kings Bench. The Plaintiff assignes for Jones 410.

Error (that whereas five were named Defendants; and in the Record it is mentioned, that after the Verdict against them all, and after the last Continuance, two of the Defendants were dead, as the Plaintiff surmised; and the Defendants hoc non dedicerunt sed cognoverunt fore verum the Judgment is entred against the three.) That the two did not die since the last Continuance made upon the Roll, but long time before the Verdict and before divers Continuances upon the Roll entred; whereupon Banks the Kings Attorny moved, that it might be examined in this Court; but the Court held, that they might not here make any such examination, being after the Judgment entred: And then it was moved, whether an Error in Deed be assignable in the Exchequer Chamber upon the Statute of 27 Eliz. Because as Berkeley said, the Statute only gives authority to examine Errors in Law. But Brampston, Jones, and my self, held, that it is well assignable; for the Statute giving the Writ of Error, gives that authority, as well to examine Errors in Deed, as Errors in Law. Then it was moved how it should be tried, and Hoddesden the Secondary said, that it hath been tried by Nisi prius out of the Exchequer Chamber, and there be divers presidents to that purpose. But Jones said he doubted thereof, because the Statute gives this power to the Justices of the one Bench and the other, and that the Court of the Exchequer Chamber is newly erected. And Berkeley held, that it was not the intent of the Statute. 27 Eliz. to give them such authority. But Brampston chief Justice and my self doubted thereof, Because the Statute giving authority to reverse or affirm, implies an allowance of the means to do it; Whereupon adjournatur. Mich. 42 & 43 Eliz. rot. 335. Rewe versus Long. Error in the Exchequer Chamber *in fait* assigned and tryed by Nisi prius, and found, and for that cause reversed. Simile Hill. 16 Jac. rot. 75 Error *in fait*, assigned there, and tried by Nisi prius. Consimile Mich. 10 Car. rot. 169. betwixt Smith and Marchant.

3 Cr. 731.
2 Cr. 5.
2 Cr. 5.

Thornton *versus* Lyster.

12.
2 Rol. 680.
Dier 23. b.

TRespas of Assault, Battery, and Wounding 1. Aug. 13 Car. The Defendant Justifies in his own defence, by reason of an Assault made by the Plaintiff; Issue being thereupon, the Defendant gives in evidence Assault and Battery by the Plaintiff, 2 Julii 13 Car. before, and that it was in his own defence, and produced divers Witnesses to prove it. The Plaintiff shews, that the Battery which he intended, was 9. Jul. 13. Car. and produced also divers witnesses to prove that. And Littleton the Kings Solicitor and others of Counsel with the Defendant insisted, that it was no evidence; for the Plaintiff ought to have made a special Replication, and shewn that special matter. But all the Court held, It was not requisite; and if another day had been shewn in the Replication, it should be a departure: But it sufficeth to shew it in evidence to

Ant 229.

be

be done at another day *sans son assault*, for the day is not material. Co. Lit. 282. a. b
Jones said, if they had both agreed upon one day, it should have been specially pleaded: But Brampston held, It was all one; and as it is now pleaded to be at several dayes, it is clerly unnecessary: And the Solicitor urged, that it should be found specially: But the Court said it was so cler, they would not have it so found. And the Jury gave one hundred pound damages.

Latham *versus* Atwood. Mich. 11 Car.

ACtion of *Trover & Conversion*, of two hundred and fifty pounds of Hops. Upon Not guilty pleaded, the Case appeared to be. *Feme*, Tenant for life, takes to Husband the Plaintiff, quinto Caroli, the Remainder being to the Defendant for his life. These Hops were growing out of ancient Roots, being within the Land in question: The *Feme* dies 19. Aug. nono Caroli, the Hops then growing and not severed, &c. And whether these Hops appertained to the *Baron*, or to him in Remainder, was the question? because she died so small a while before the gathering of them; and they be such things as grow by manurance and industry of the owner, by the making of Hills, and setting Poles. And the Court, upon the motion of Grimston, who was of Counsel with the Plaintiff, held Co. Lit. 56. a. that they be like Emblements, which shall go to the *Baron*, or Executor of the Tenant for life, and not to him in Remainder; and are not to be compared to Apples or Nuts, which grow of themselves; wherefore adjudged for the Plaintiff. 13.

Bayns *versus* Brighton.

DEbt for 40 s. upon a Bill obligatory, and declares, That the Defendant by his Bill, dated Febr. confessed himself to be endebted to the Plaintiff in twenty shillings, solvend at Michaelmas following, Ad quam quidem solutionem faciend. he did oblige himself in forty shillings, and for non payment of the forty shillings the Action was brought. The Defendant pleaded, that at the time of the Obligation making, he was within age, and issue thereupon, and found for the Plaintiff: And now Germin Serjeant moved in arrest of Judgment, that the Declaration was ill, because it is not therein alledged, that the twenty shillings was not paid at the day; for if otherwise, the forty shillings is not due: And of that opinion was all the Court; for it is not an Obligation with a Condition; whereupon Rule was given, that Judgment should be entred for the Defendant, unless, &c. 14.

Anonymus.

ERror of a Judgment in the Common Bench, in Action for words. Whereas the Plaintiff being an Attorney, & maintaining 15.

taining himſelf, his wife, and Children by his practice, that the Defendant ſpake theſe words of him, and of his Office. He is a very baſe Rogue, and a cheating Knave, and doth maintain himſelf, his Wife, and Children by his cheating. Upon Not guilty pleaded, and verdict for the Plaintiff, and Judgment given, the Error aſſigned was, that an Action lay not for theſe words. But all the Court held, that the Action was maintainable; For it toucheth him in his profeſſion: whereupon Judgment was affirmed.

Ant. 229. 460. Ant. 510. 2 Cr. 586. 2 Cr. 427. Ant. 417. Poſt. 552. 2 Cr. 339.

Davenport *verſus* Penſell. Trin. 14 Car. rot. 698.

16. 1 Rol. 526. 910. ASſumpſit againſt an Adminiſtrator, durante minore ætate of J. S. upon a promiſe to pay for forbearance of a ſum, &c. The Defendant pleads, that the ſaid J. S. was above the age of ſeventeen years at the time of the promiſe; and thereupon it was demurred. The queſtion was, whether the Adminiſtration ſo committed durante minore ætate, inſtantly determined, by his coming of ſeventeen years of age; for then the Adminiſtration ceaſing, there cannot after be any conſideration to ground a promiſe? And it was urged, that in our Law Minor ætas was one and twenty years: But Grimſton of Counſel with the Plaintiff ſaid, that this was to be conſidered according to the Civil Law, which appoints ſeventeen years to be full age in ſuch a Caſe, Cok. lib. 5. fol. 29. Et Curia adviſare vult.

1 Rol. 526.

Appleton *verſus* Stoughton. Hill. 10 Car. 256.

17. Jones 412. 2 Rol. 579. DEbt. Upon the Statute quinto Elizab. and Demand 22 l. becauſe he uſed within London the trade of a Point-maker, for the ſpace of eleven months, not being brought up as an Apprentice for ſeven years. The Defendant pleaded the cuſtom of London, that any who is a Freeman of one trade, may uſe any other trade within the City; and pleaded the Statute of 7 Ric. 2. which confirms the Cuſtoms of London, &c. Upon this Plea a Demurrer was tendred, and the queſtion was, Whether ſuch a Cuſtom may be good againſt the Statute of quinto Eliz. But becauſe it was a general Statute, the Court inclined in opinion, That this Cuſtome might be good, and not taken away by the ſaid Statute, being a ſpecial Cuſtom in a particular place. Then the Plaintiff took Iſſue upon the Cuſtom, and the Defendant joyned; and the Plaintiff ſurmiſed, that there is a Cuſtom in London, that if any Cuſtom of London be pleaded, and denyed, and Iſſue thereupon, it ſhall be tryed by a Writ to the Major and Aldermen, to certifie whether there be ſuch a Cuſtom; and they ſhall make their Certificate by the mouth of their Recorder, Ore tenus; and prayed to have a Writ to certifie. And becauſe the Defendant hoc non dedicit, a Writ was awarded accordingly: And the Recorder certified, that there was no ſuch Cuſtom for one who uſeth

Ante 347. Ante 361. Co Lit. 74. a.

a

a manual trade, that he may exercise any other trade, not being Apprentice, or brought up thereto; but that there was such a Custom concerning trades of buying and selling, as Mercer, Grocer, &c. And after this Certificate it was moved, that this was a Mis-trial; For it being a Custome which concerns all the Citizens, ought not to be tryed by such a Certificate, but by Jury. And Bulstrode, who argued for the Defendant, insisted much upon a Case in the Common Bench, reported by the Lord Hobert, that a Custom of London, which concerns all the Citizens, shall be tried *par Pais*: But after long deliberation, it was resolved by all the Court, that the Tryal was good, especially when the Plaintiff hath shewn, that there is such a Custom, that it shall be so certified, and the Defendant hath confessed it; so as this manner of Trial, being as it were by his consent, he shall not after such Trial except against it. And this Custom doth not concern all the persons of London but only those who use manual Trades: As if the Custom to devise in Mortmain, or of foraign Attachments, had been tried by Certificate; so here the trial is good; And it was adjudged for the Plaintiff. Vid. Cok. lib. 4. 30, 39 Hen. 6, 34. Coke lib. 9 fol. 31. Broke London 17, 21 Ed. 4. 4. 33 Hen. 8. Brook Trials 14.

Ante 361. Hob. 86. Ante 248. Ante 248.

Tomlins *versus* Brett.

ERror of a Judgment in the Common Bench, in *Formdon in Descender*: Where the tenant vouched J. S. And the Demandant counterpleads, that the said John Style, or any of his Ancestors, &c. nunquam aliquod in tenementis, &c. omitting the word habuerunt. And issue being joyned, and Nisi prius awarded, at the day of the Nisi prius the Defendant made default; And at the day in Banco he made another default; whereupon a Grand Cape was awarded, and Judgment given: And now Error brought, because there was no Issue joyned by the Tenant. But the Court would not allow thereof, but affirmed the Judgment: For after the default, the issue and the pleading is out of the Court, and the Judgment is only upon the default.

18. Jones 412.

Aungell *versus* Sir William Cooper, Trin. 10 Car. rot. 1331.

ERror of a Judgment in the Common Bench, Where in a Scire facias upon a Judgment of 900 l. and Execution thereupon, the Defendant there being dead, the Plaintiff surmised, that he was seized of Lands in the Counties of Kent, and Surry, and prayed a Scire facias into the several Counties: And the Sheriff of Kent returned, that Aungell was *Terr-tenant* of the Land in the County of Kent: And the Sheriff of Surrey returned, that one Bell and his Wife were *Terr-tenants* of the Defendants Lands in Surrey. Whereupon Aungell being warned, took upon

19. 1 Rol. 755. 6.

on him the Tenancy of the Lands mentioned in the Sheriffs return,
2 Cr. 507. and pleaded, that another man in the same County at the time of the said return, had other Lands, whereof T.D. was *Terre-tenant*. Sir William Cooper, the then Plaintiff, denied it, and issue thereupon, and found for the Plaintiff, and Judgment for him against
2 Cr. 507. Aungell the now Plaintiff. But for the Lands in Surry, Bell and his wife pleaded, that they were not Tenants: And thereupon they were at issue, and found for them before the Justices of Assise, and Judgment given, Quod eant inde sine die. And now Aungell brings Error upon that Judgment, and assignes for Error, That the said Bell was dead before the time of the trial; whereupon it was demurred: And now argued at the Barr by Maynard for the Plaintiff in the Writ of Error, that for as much as the Plaintiff is not to have his Land charged sole, if there be more Land: And by the surmise of the Defendant (who was Plaintiff in the first suit) there is Land in the County of Surry chargeable therewith, And by the Sheriffs return that Bell and his wife were *Terr-Tenants*, the finding by the Jury, after the death of Bell, is void, and so the issue not tryed, the Judgment is erroneous: Therefore he conceived, that the Plaintiff may well assign it for Error, and take advantage thereof. But Rolls for the Defendant in the Writ of Error shewed, that for as much as there be two several Scire facias into several Counties, they be as several suits, the one not depending upon the other, And the proceedings
Post. 551. Ant. 426. are several: And although there be death, &c. alledged in the one, yet it is not material, as to the other Suit; Nor is there any cause that the other, against whom the Verdict is found, should assign it for Error, And he cited for this point, 5 Ed. 4. 7. And of that opinion was Brampston, Jones, and my self: For although Bell be dead, it is not material to Aungell, especially as it is found by this Verdict, that Bell was not Tenant. So the Court is ascertained, that he was not Tenant, although by death the Verdict be void. Whereupon Rule was given, that the Judgment should be affirmed.

Mounson *versus* Bourn.

20. 1 Rol. 930. 1. ERror of a Judgment in the Common Bench, in Debt, by William Bourn, against Sir William Mounson and Margaret his wife, Executrix of Charles Earl of Nottingham for 200 l. The Defendants appeared and Judgment against them of Debt, and four pounds costs de bonis Testatoris, &c. Et si, &c. tunc de bonis propriis for the four pounds for costs. This being in London, a Fieri facias was awarded to the Sheriffs of London,
R 200. who returned Nulla bona Testatoris, and for the four pounds, Nulla bona. The Plaintiff afterwards upon a Testatum that goods were sold and *esloyned*, procured a new Fieri facias, reciting the Judgment and the former Writ and return thereof, Et quod Testatum

tum existit, That they had goods sufficient, and had *esloyned* and sold them; wherefore the Sheriffs of London were commanded, That they by Enquisition, vel alio modo quovisiibet quo constare poterit, should enquire if they had sold or *esloyned* the said Goods: And if it were so found, Quòd scire faciant to the said Sir William Mounson & Margaret his wife that they be in Court in octab. Mich. to answer thereto. Hereupon the Sheriff returned an Enquisition, finding the sale and *esloyner* of the said Goods, and that they scire fecerunt, &c. And the parties appeared and demurred upon the Writ. And the Court, after divers adjournments, adjudged the Writ good, and that the Defendants should answer: Whereupon they imparle: And afterwards Judgment was given by Nihil dicit that the Plaintiff should have Execution de bonis suis propriis, Upon this a writ of Error was brought Tam in redditione Judicii quàm in redditione Executionis. And Taylor for the Plaintiff assigned Error in the Judgment, because it was Quod recuperet the damages de bonis propriis, si non habeant bona Testatoris, where they appeared the first day upon the Summons: And Judgment given the same Term upon a Nihil dicit, where they ought to have had Judgment de bonis Testatoris: And for that purpose he cited 31 H. 6. 13. 33 H. 6. 23. & 34. H. 6. 27. Sed non allocatur; Because it is not the confession, but the delay which is the cause the Plaintiff shall recover damages de bonis propriis. Secondly, whereas it was objected, that the Judgment being de bonis propriis against the *Feme*, And in Law a *Feme covert* hath not any goods; therefore the Judgment should be void, It was resolved, That the Judgment was well given; For the *Baron* being only charged in right of his *Feme*, the Judgment shall be against both; And she may have Goods, as a term or Chattel reall before the Coverture: Also she may have Goods after her husbands decease. Thirdly, that a Devastavit may well be by a *Feme* by *esloyning* the Goods: As a *Feme covert* may do a *Tort*, and be punished for it. Also this was a Devastavit by the *Feme* when she was sole. And it was held that if a man takes an Executrix to wife, and waste the Goods, it is a devastavit in the *Feme*: For it was her folly to take such an husband who would make a devastavit. And Jones said, If there be a recovery against *Baron* & *Feme* upon a Devastavit, if the *Baron* survive the *Feme*, he shall be charged; also if the *Feme* survive, she shall be charged: But if the Recovery be not against *Baron* and *Feme*, in the life of the *Feme*, and she dies, the *Baron* shall not be charged: Whereto Brampston agreed. And for the principal matter I delivered my opinion, that this writ is good, & the Judgment good, as this case is: For they being returned warned, and appearing and demurring upon the writ, which being adjudged good (as well it may, being a judicial Writ and framed by the discretion of the Court,) and the party being warned and not pleading, or traversing the Devastavit (as he well might) There is great reason, Judgment should be entred against them; For it was their folly the,

Post. 564. 603. Dier 210. a. 3 Cr. 859. 60.

2 Cr. 191.

Co. 5. 27. b.

Post. 603.

they would not plead: And it is out of the miſchief put in Pettifers Caſe, Cok. lib. 5. fol. 32. Wherefore, &c. Jones and Brampſton would not deliver any opinion in the firſt point, but would adviſe. Berkeley was abſent and in Chancery. Vide plus poſtea, fol. 526.

Tho. Morrice and others *verſus* Prince.

21. Jones 413. 2 Rol. 424. 8. 693.

ERror by Tho. Morrice and Elizabeth his wife, againſt Thomas Middleton, James Palmer, John Lewis, Evans Potham, J. S. and T.D. of a Judgment given againſt them in an Aſſiſe, in the County of Montgomery, to their damage, &c. Upon this the Record was certified, that the aſſiſe was brought 5 Mali, 10 Car. againſt the ſaid ſix Defendants, and Charles Vaughan & Margaret his wife, Sir Peter Mutton, and ſix others (in all fifteen perſons) that the Aſſiſe was de liberto tenemento ſuo in Brentdaigne, & in five other Villages within the ſaid County. The ſaid fifteen Defendants being returned attached, the Plaintiff makes his Pleint to be diſſeized of his Freehold, viz. of 20l. rent iſſuing out of forty Meſſuages, one thouſand acres of Land, fifty acres of Meadow, &c. in the ſaid Villages, within thirty years, &c. And for title he ſaith, that one Edward Prince Eſquire was ſeized in Fee of the tenements aforeſaid, in the Villages, &c. and held them in Socage; And by his Will in writing, 20. Decemb. anno 1 Jac. deviſed to the Plaintiff a rent of twenty pounds per annum, iſſuing out of the ſaid tenements, for his life. And afterward the ſaid Edward died ſeized, and the ſaid tenements deſcended to the ſaid Elizabeth (who afterwards was married to the ſaid Thomas Morrice) and to the ſaid Margaret (who was after married to the ſaid Charles Vaughan:) And that the Plaintiff was ſeized of the ſaid rent by the hands of the ſaid Thomas Morrice, being ſeized of the Freehold of the ſaid tenements in right of the ſaid Elizabeth, in forma prædicta, until by the ſaid John Morrice and Elizabeth and the other thirteen Defendants he was diſſeized; and thereupon brought this Aſſiſe. The ſaid Charles Vaughan and Margaret, and nine others of the Defendants made default; wherefore the Aſſiſe was awarded againſt them by default. Four other of the Defendants, viz. Tho. Morrice and Elizabeth his wife, Thomas Middleton and James Palmer pleaded, that they were tenants of an acre, parcel of the Tenements, put in view, and that Roger Palmer and William Hewks were Tenants of the Freehold of a Meſſuage and four acres of Land put in view, &c. who be not named in the Writ; for which they demand Judgment of the Writ. And if, &c. the Jury find, that Roger Palmer and Will. Hewks were not Tenants, &c. And that the Plaintiff was ſeized by the hands of the ſaid Thomas Morrice, prout: And that the Plaintiff demanded of the ſaid Thomas Morrice and his Wife, Thomas Middleton, James Palmer, John Lewis, and Evans

Evans Potham, the ſaid Rent; and that they denied to pay it: And ſo they diſſeiſed him of the ſaid rent, and found arrearages for thirty years and an half. And for the other nine, they find, That they did not diſſeiſe. And hereupon Judgment was for the Plaintiff againſt Sir: And for the nine, *Quod alerant ſans jour*. Upon this, Error was brought and aſſigned principally, becauſe he demanded rent by a deviſe; whereof arrearages are found for thirty years: And it doth not appear when the Deviſor died, nor any time or feaſt appointed for the payment; and therefore the Verdict is clearly ill, becauſe the time of the Deviſors death not appearing, the certainty of the arrearages cannot be known. The ſecond queſtion was, If the Jury, finding a ſeiſin by the hands of one of the husbands of the ſaid heirs, whereas the Land deſcended to two daughters, Whether this were a ſufficient finding of the ſeiſin? And reſolved, That it was: As ſeiſin given by one Joyntenant, &c. The third queſtion was, If the Jury finding the demand of the rent from Sir of the Defendants, and their denial of payment; and not finding, That it was demanded upon the Land (but, that they ſo diſſeiſed the Plaintiff) whether that were ſufficient? For it was held by all the Juſtices, That the demanding of it of their perſons off the Land, and their denial is not ſufficient: For it ought to be upon the Land. But this being upon a Verdict in an Aſſiſe, I held, That the Court ſhall intend it was a demand upon the Land, as 33 Ed. 3. title Verdict 40. & Cok. lib. 9. But Brampſton, Jones, and Berkeley held, That it ſhall not be ſo intended; And the Judgment was reverſed, becauſe it was not found when the Deviſor died.

Co. 6. 57. b.

Co. Lit. 315.

Ante 508.

Co. Lit. 202. a.

Lee *verſus* Boothby.

UPon Evidence to a Jury at the Bar for a Copyhold, parcel of the Manor of Earls-Chingford, in the County of Eſſex. The queſtion was, If a Copyholder in Fee ſurrender to the Lord of the Manor his Copyhold Eſtate; and the Lord makes a Leaſe for years of the Manor and of the ſaid Copyhold, by the name of his Tenement called H. whether it were a determination of the Copyhold? And it was held by all the Juſtices (abſente Brampſton) That it was not, Becauſe when he lets the Manor, it is included as a parcel of the Manor: But if he, though he had been but Dominus pro tempore, or for half a year (though by parol) had made a Leaſe for years of the Copyhold by it ſelf, that had deſtroyed the Copyhold; for it was then, during that time, ſevered from the Manor; and ſo could never afterward be demiſeable again by Copy: But the Manor being demiſed, includes the Copyhold as parcel of the Manor, and the naming of the Copyhold is ſurpluſage, and it remains always as parcel of the Manor, and demiſeable by Copy as it was before.

22. Jones 449.

Co. 4. fol. 31. b.

Claxton *versus* Libourn.

23. WRit of Right in Durham. The Tenant waged Battail, which was accepted, and at the day to be performed, Berkeley Justice there, examined the Champions of both parties, whether they were not hired for money? And they confessed they were: Which confession he caused to be recorded, and gave further day to be advised. And by the Kings direction all the Justices were required to deliver their opinions, whether this were cause to dearraign the Battail by these Champions. And by Brampston chief Justice, Damport chief Baron, Denham, Hutton, Jones, my self, and other Justices, it was subscribed, That this exception, coming after the Battail gaged, and Champions allowed, and Sureties given to perform it, ought not to be received. Bracton 161.

Goodwin *versus* Anne West. Hill. 13 Car. rot. 1321.

24. DEbt, for ten pounds upon the Statute of quinto Elizabethæ, Whereas the Plaintiff, having a Suit in the Common Bench against one Turburlack, in an Action for words; Wherein he shews, That he was a Suitor to the said Anne West, the now Defendant, to have married her (she being a woman of a good Estate;) And that the then Defendant, to defame him and deprive him of his hopes of the said Marriage, said of the Plaintiff, He hath had a Bastard by one *A. S.* whereby he was greatly disparaged, and lost the said Marriage. To which the then Defendant pleaded Not guilty: And thereupon a Nisi prius being awarded to be tried at Gloceſter the one and twentieth of July following; he sued a Writ of Subpœna out of the Common Bench, directed to the said Anne West, to testifie in the said cause at the said Assises, before the Justices of Nisi prius, upon the said one and twentieth of July; and that the seventeenth day of July decimo quarto Caroli he shewed it to the said Anne West, the now Defendant, and left a Note with her of the day and place of Appearance, and delivered unto her twelve pence towards her expences and charges, and promised unto her, if she would come at the said day and place to testifie, &c. he would give her so much more pro expensis & oneribus suis as she would reasonably require; which sum of twelve pence she accepted; And that she did not come ad testificandum, although she was required, whereby the Action passed against Post. 541. him: Whereupon he demanded, according to the Statute, ten pounds, and his further damages by the Court to be tared. And upon Non debet pleaded, it was found for the Plaintiff. And now Charles Jones moved in arrest of Judgment, first, That the Statute is misrecited: For the Statute is, If Suit be commenced in

in aliquibus Curiis, and he recites it in aliqua Curia; ſo it varies. Sed non allocatur; For it is all one in intendment. Secondly, Becauſe he doth not aver, that he ſaid twelve pence was ſufficient, otherwiſe ſhe is not to ſtir out of her doores. And of that opinion was Brampſton chief Juſtice, becauſe ſhe is not compellable to come upon promiſe, without charges delivered. Jones doubted thereof; but Berkeley and my ſelf held it to be good, when ſhe accepted the twelve pence; and ſhe did not ſay ſhe would have more for her expences. Thirdly, that oneribus is no word for charges: Sed non allocatur; For being joyned with expences, it ſhews, that it was intended pro miſis. Poſtea pag. 540.

Termino Hillarij, anno decimo quarto *Caroli* Regis, in Banco Regis.

The Lord Sayes Case.

1. ACtion *sur Trover & Conversion*, of three Oxen taken for three pounds five shillings, assessed by the Sheriff of Lincoln upon the Plaintiff, towards finding of a Ship. Upon demurrer at the Bar, Holbourn being ready to argue, Banks Atturney General moved, That he might not be permitted to argue any of the matters, contrary to the Judgment in the Exchequer Chamber betwixt the King and Master Hampden, wherein he said four points were adjudged. First, That the Writ was legal by the Kings Prerogative, or at leastwise by his Regal Power. Secondly, That the Sheriff, by himself without any Jury, may make the Assessment. Thirdly, That the in-land Counties ought to do it at their proper charges, and to find men and victuals out of their Counties for the time in the Writ mentioned. Fourthly, That the sum assessed was a Duty, and may be levied. Holbourn offered to argue, That any one, who was not party to the former Judgment given in the Exchequer Chamber, may be permitted to argue against it: But Brampston, Jones and Berkeley (the Writ being allowed to be legal) said, That such a Judgment ought to stand, until it were reversed in Parliament. And none ought to be suffered to dispute against it. Note, That the resolution in Mr. Hampdens Case was adjudged to be against Law, and repealed by the Statute of 17 Car.

Post. 601.

Vide infrà pag. 601.

Edwards *versus* Rogers. Trin. 11 Car.

2. Jones 456. March 94. TResp̃as. Upon Not guilty, and a special Verdict, the Case was. Tenant for life, Reversion to William Rogers, an Ideot, in Fee: Andrew Rogers his Uncle levies a Fine *come ceo, &c.* with proclamation to Robert Crompton; And had issue John, who had issue William the Defendant, and died. William the Ideot died without Issue; William the Defendant enters as heir unto him, viz. son and heir of John, son and heir of the said Andrew. And whether he may claim against this fine of his Grandfather (not claiming by the Grandfather, but deriving only his Pedigree from him) was the question? And it was argued by Rolls for the Plaintiff, that for as much as William Rogers is heir to Andrew his Grandfather, uncle to the said William the Ideot, he is estopped to claim against this fine, or to say, Quod partes ad finem nihil habuerunt. And for proof thereof, he relied upon the Statute 27 Ed. 1.

of

of Fine, and 8 H. 4. 9. 40 Ed. 3. 9. 2 Ed. 3. 10. 17 Ed. 3. 54. 2 Ed. 3. 6. 19 H. 8. 7 Co. lib. 3. fol. 89. 18 Ed. 3. 41. 11 H. 7. 12. 10 Car. Scovell and Braſtocks Caſe in this Court, Cok. lib. 3. fol. 50. Sir George Browns Caſe, and Saule and Clerks Caſe. But it was argued by Farrer for the Defendant, That this fine ſhall not bar, Becauſe he claims not any intereſt by or from Andrew, nor as heir unto him, but only makes mention of him in the Pedigree: And he relied upon Hobbes Caſe in the Exchequer, cited in Cok. Littleton fol. 8. a. 2 Ed. 3. 6. et 10. 17 Ed. 3. 54. 38 Ed. 3. 11. Cok. lib. 8. fol. 53. Symms Caſe, 36 Ed. 3. title View 30. *in fur cui in vita*, 33 H. 6. 18. 15 Ed. 4. title Entry Congeable 51. 39 H. 6. *de Feffment del fits in vie ſon peir*: And that here he is in quaſi of another Title, and *puiſny* to the fine. Vide Dyer 277. Vide plus poſtea. Pag. 543. Ante 435. Ante 156. Lat. 64. 72. Dier 3. a.

Whyte *verſus* Hanbye. Paſch. 14 Car. rot. 465.

ERror of a Judgment in the Common Bench, in an Action of *Trover & Converſion* of goods. The Writ ſuppoſeth, That ſuch a day, apud Alſton in Comitat. Suff. he was poſſeſſed, &c. and loſt them; and the Defendant found them, and converted them to his own uſe; and in the Count he ſheweth the *Trover & Converſion* to be at Alſton aforeſaid: And the Error was aſſigned, becauſe the place of *Converſion* was not ſhewn in the Writ. And now Maynard for the Plaintiff, in the Writ of Error, argued, That the place of *Converſion* ought to be ſhewn in the Writ, For it being an Action upon the Caſe, the Count otherwiſe is not good; and for that purpoſe touched 3 Hen. 6. 48 Ed. 3. 6. Berkeley and my ſelf being only in Court, held, That the Writ was good enough: For the poſſeſſion ſuppoſed to be at Alſton, and the loſs *Trover & Converſion*, being all conjoyned with a Copulative, ſhall be intended all in one place, viz. at Alſton, eſpecially the Count mentioning the *Converſion* to be at Alſton, and the Iſſue there tried, and Verdict given. But Berkeley ſaid, If the Writ be vitious for this cauſe, it is not aided by the Verdict: But we both agreed, That as this caſe is, the Writ is good; Whereupon Rule was given, that Judgment ſhould be affirmed, unleſs, &c. 3. Ante 262.

Aſcoughs Caſe in the Court of Wards.

THis Caſe was referred by the Kings command unto the Juſtices of the Kings Bench, to certifie their opinion, which was thus. One *Aſcough*, ſeized in fee of the Manor of D. holden by Knight ſervice *in Capite*, deviſeth the ſaid Manor, to be ſold by his Executors, part of the money to be paid to his Wife, and part in divers other Legacies, the reſidue to be beſtowed in charitable uſes, *viz.* for the marrying of poor Maidens, and relief of Priſoners, *&c.* The firſt Queſtion was, Whether this were a good Deviſe to bind the King, and to bar him of his primer Seiſin by the Statute of 43 *Eliz.* of charitable 4. Jones 428.

charitable Uſes? And all the Juſtices held clearly, This ſhall not bar the King for his intereſt of Wardſhip, Livery, or primer Seiſin, becauſe general words where the King is not named, ſhall never bind or bar him. The ſecond Queſtion was, Whether ſuch a Deviſe by the ſaid Statute, be good againſt him for the whole, and ſhall bar the Heir to claim a third part? And they all reſolved admitting it to be a Conveyance within the Statute, yet it is void againſt the Heir for the third part; For by the Statute of 32 & 34 *Hen.* 8. he hath no power to diſpoſe but of two parts; ſo for the third part it is clearly void. The third Queſtion was, Whether this were a Conveyance within the Statute of 43 *Eliz.* Becauſe here is not any diſpoſition of the Land to charitable uſes, but an appointment, That the Land ſhall be ſold, and the money divided, part to his Wife (who is clearly out of the Statute,) another part to ſatisfie divers Legacies, and the reſidue, which in truth was the greateſt part, to the ſaid charitable uſes? But as to this, they all reſolved not.

Gybbs *verſus* Wybourn.

5. Jones 416. 1 Rol. 637. PRohibition. For that the Defendant libell'd in the Spiritual Court for Tythes of young Trées planted in a Nurcery, upon purpoſe to be rooted up and ſold to be planted in other Pariſhes. Upon demurrer the queſtion was, Whether Tythes ſhall be paid for them? For Rolls for the Plaintiff argued, That they were of the nature of the Land, and Tythes ſhall not be paid of them, no more than of Mines of Coal or Stone digged, or for Trées or Wood ſpent in hedging, or Fuel in the houſe, wherein Husbandry is maintained. But Maynard argued, That for as much as he made 1 Rol. 637. a profit by ſuch young Trées, it is reaſon Tythes ſhould be paid for them when he diggs them up and ſells them in another Pariſh, as well as of Corn, or Carret-roots or ſuch things. And of this opinion was all the Court; whereupon a Conſultation was awarded.

The Lord Mounſon and his Wife *verſus* Bourn. Cujus principium ante pag. 518.

6. Jones 417. 1 Rol. 933. WAs now argued openly at the Bench by Jones and Berkeley for the Defendants in the Writ of Error, That the Judgment ought to be affirmed: And Berkeley argued, Firſt that there being no Error aſſigned in the principal Judgment, it is therefore to be affirmed. The Error aſſigned was in redditione Executionis, becauſe the Scire facias in the ſaid Writ was, Si conſtare poterit per Inquiſitionem, vel alio modo, that they had waſted the goods, Quod ſcire faciant eis ad reſpondendum to the ſaid Devastavit, and ſhew cauſe wherefore Execution ſhould not be awarded of their proper goods, which being a Judicial Writ, may be well framed, as the Court ſhall appoint; For as the Regiſter is the Rule for

for Writs original, whereby they are framed (which is confirmed by Act of Parliament) and there ought not to be any variance from them, but by authority of Parliament, as the Statue of West. cap. 2. saith: So for Judicial Writs, they may be framed according to the discretion and direction of the Court: And for this cause these Writs have been usually granted in the Common Bench, and frequently used after 9 Hen. 6. as appears by the said Book fol. 57. and therefore we ought to adjudge it to be the Law in the same Court, and not to adjudge the contrary, as in Cok. lib. 2. fol. 61. b. Wiscots Case. Ejectione firmæ of a Lease by *Baron* and *Feme*; And he doth not shew, That it was by Deed (and without Deed it is clear it is not a Lease of the *Feme*) Yet because it is usual in the said Court, to omit the mentioning of the Deed; it shall be intended to be by Deed; and the Presidents of the Court warrant such declarations, therefore it was adjudged to be good: So Cok. lib. 4. fol. 93. a. Slades Case, adjudged by reason of the multitude of Presidents in the Kings Bench, That an Action upon the Case may be maintainable, where he might have had an Action of Debt, and that the common course had been to have Debt until then, and some had been reversed for this cause; yet being argued in the Exchequer Chamber, and there made apparent by the Presidents in the Kings Bench, That such Actions were allowed in the Kings Bench, it was adjudged, That it ought to be taken for Law: And so it had been used since in the Common Bench; yet no Presidents were shewn before the time of Hen. 6. So here the Presidents and Judgments in the Common Bench, warranting this course, it is to be taken now, as the Law of the Court, and to be allowed. And to answer to Pettifers Case, Co. lib. 5. fol. 32. he said, There was great difference betwixt the said Cases; For there the inconvenience was, because the Judgment was by default upon two Nihils returned; but here they be returned, warned, and appeared, and they might have traversed the Enquisition, and taken Issue thereupon, That they had not made any devastation. And for the Case cited 12 Ed. 3. tit. Execut. 9. it is an harder case than this; for there, upon a Fieri facias, was returned Nulla bona; and upon a Testatum, That they had goods and wasted them, the Sheriff was commanded, That he should enquire thereof; and if he found they had wasted, he should make Execution de bonis propriis; So without any other warning, he was to take their proper goods in Execution: Yet he conceived, That in such case, if the Sheriff had done so, he was not chargeable in an Action upon the Case, because he did it by the Courts command: But in this case the Court was more favourable, to have an Enquisition before, and not immediately to make execution, but to warn the parties to shew cause wherefore he should not have execution. And when they appeared, and would not answer, but suffered it to pass by nihil dicit, it is quasi a confession thereof, and therefore good reason they should be charged de bonis propriis; wherefore he concluded, that

Noy 11.

Lib. 10. f. 77. a.

That there is no Error, either in the Judgment or Execution; And that they should be affirmed. Jones argued to the same purpose,
2 Cr. 3. That the Custom and Presidents in all Courts are the Law in the same Court, and constant Judicial proceedings are to be accounted
Dier 168. a. Law; and therefore in the Common Bench it is the usual Course, to have but one Scire facias to have Execution, which being returned Nihil, the party is to have Execution. But in the Kings Bench the usual course is to have two Scire facias's: And if Execution be
2 Cr. 59. taken upon one Scire facias awarded, and Nihil returned, it is Error, and therefore may be reversed, because it is contrary to the course of the Court: And this Case differs from the reasons and mischief in Petifers Case, Because the return here is, That they were warned and made default, and would not plead; whereupon he concluded also, That the Judgment and Execution should be affirmed. Brampston chief Justice argued the same way, That as this Case is, it should be affirmed; For it is no inconvenience here to the parties, or to the Sheriff, when the Sheriff takes an Enquisition which finds a Devaltavit, and the party is warned and appears, and demurrers thereupon, so that he takes notice of the Writ: And the common course and presidents of the Court are the Law of the Court, and one Court ought to take notice of the customs and
Ante 5. 3. courses of other Courts, as it is held 6 Ed. 4. 1. 11 Ed. 4. 1. and Co. lib. 2. fol. 16. Lanes Case, which is a stronger Case than this; For there it is, That a Lease under the Exchequer Seal is as well allowable and pleadable in this Court, as if it had been under the great Seal: And although regularly a Freehold cannot pass but under the great Seal, yet in regard of the usual course of the Exchequer, and multitude of Presidents there, (of which course the Common Bench ought to take notice) and for the inconvenience whereby many Subjects should be otherwise prejudiced, it was adjudged good and allowable there, à multo fortiore here, because this course of awarding those Writs hath been continued in this Court ever since 9 Hen. 6. and therefore there is great reason they should be now allowed. And for the mischief alledged, That the party
R. 180. should be concluded by this Enquest of Office, it was said, there was not any mischief; For it was agreed by all of us, That he may contradict it upon his appearance, and traverse it; and when he is warned, and will not answer, it is quasi a confession that it is true; and it was his fault he would not traverse it. And where it was said, That it may be taken by default, upon two Nihils returned
Co. 5. 32. b. and so he should be prejudiced, I thereto answered, There was not any mischief; for if it should be false, he might have an Audita querela, and so help himself, as Fitzh. N. B. fol. 104. I. And so we concluded, That the Judgment and Execution should be affirmed, and gave a Rule to the Prothonotaries, That such course of Writs should be here used, as consonant to Law and Justice.

Smith

Smith *versus* Risley and others. Trin. 14 Car. rot.

EJectione firmæ. Upon a special Verdict the Case was, Paul Risley was seized in fee of the Lands in question, and by Indenture betwixt him and Sir Thomas Denton, Sir Alexander Denton, Thomas Risley his brother, and William Withers covenanted and agreed with them, That for the favour and affection which he did bear to his wife and children in that Indenture mentioned, and for the better maintenance, livelyhood, and preferment of them, and to the intent to settle the Lands, Tenements, and Hereditaments hereafter mentioned in the name and blood of the said *Paul Risley*; he did thereby covenant for him, his Heirs and Assigns, to and with the said four parties and their Heirs, That he the said *Paul Risley* and his Heirs shall at all times from henceforth stand and be seized of the said Tenements (in the Declaration mentioned) to the use of the said *Paul Risley* for term of his life, without impeachment of Waste; and after his decease, to the use of *Dorothy* his wife, for term of her life; and after her decease, to the use of the said Covenantees and their Heirs. Nevertheless, upon special trust and confidence, That they shall make Leases and Estates thereof, or of any part thereof, as the said *Paul Risley* shall appoint by any his Deed, &c. And in case that he make not any such appointment, then the said Covenantees and their Heirs shall levy out of the Rents, Issues, and Profits thereof, for his younger Children hereafter named, *viz. Crescens*, *Peter*, and *Paul* his younger Sons, and for *Mary*, *Dorothy*, and *Elizabeth*, his three Daughters, two hundred pound a piece: The Daughters Portions to be paid at their respective ages of twenty years, and the Sons Portions at their respective ages of twenty four years, and that the said Covenantees and their Heirs shall pay, allow, and give out of the Rents, Issues and Profits to every of the three Sons and three Daughters, such reasonable maintenance as they shall appoint; and after the decease of the said *Paul Risley* and *Dorothy* his Wife, and the said Portions levied, then to the use of *Thomas Risley* second Son of the said *Paul Risley* (the now Defendant) and the Heirs of his body; And for want of such Issue, then to the said *Crescens* and the Heirs of his body (and so to his other Sons, and then to the use of his Daughters and the Heirs of their bodies;) And for want of such Issue, to the use of the right Heirs of the said Daughters for ever. The Jury finding that quinto Septembris, secundo Caroli, Paul Risley died, and that Dorothy his Wife survived him, and entred, and was seized, prout Lex, &c. And that afterwards, viz. 12 Septemb. 2 Car. Sir Thomas Denton and the other three Covenantees by Indenture, inrolled within six months, in the Chancery, bargained and sold to the said Thomas Risley the Brother the said Tenements, habendum to him and his Heirs of his body, to the intent he should perform the trusts in the said first Indenture mentioned, the Remainder over,

7. Jones 418. 2 Rol. 783.

Pl. Com. 305. a. Yelv. 51.

as is limited in the first Indenture. They find, That Mary, one of the daughters attained to the age of twenty years, in the life of the said Paul Risley; And that Dorothy, another of the daughters, attained to the age of twenty years, after the death of the said Paul Risley, in the life of her Mother; And that none of their portions were paid; And that William Risley (the Lessor of the Plaintiff) son and heir of the said Paul Risley entred, and made this Lease, and the Defendants *ousted* him. Et si super totam materiam, &c. the Defendants be guilty, they pray the discretion, &c. And it was argued divers times at the Bar by Ward and Holbourn for the Plaintiff, and by Porter and Grimston for the Defendants. And it was said for the Plaintiff, That this Deed raised no uses, Because all the four Covenantees besides Thomas Risley the brother, are strangers in blood to the Covenantor: And that Thomas Risley the brother, although he were named brother, was named for distinction only betwixt him and Thomas Risley the son, and not for the consideration of blood to raise a use to him; And the intention was to settle an use in them four, for performance of the Truths mentioned in the Deed, and for setling the uses in them all, or else in none of them: And none of the considerations in the Deed extend to Thomas the brother, nor is intended for his benefit; and so none of them can raise a use in him. For the first consideration is, for the preferment of his wife; The second, for the preferment of his Children; The third, to raise portions for the use and benefit of his Children; and there is not any benefit or profit mentioned to the brother, or his children: And if a use should be raised out of the residue, it is upon a contingency, viz. after payment of the portion; And it now appears, that they are not paid, nor can be paid, because the one daughter came to her age of twenty years before the death of her father, the other daughter before the death of her mother. But all the Court resolved, That the uses are well raised and vested in Thomas his brother (but not in any other of the three Covenantees) because he is of the blood; And one of the considerations is, For consideration to settle it in his blood, which is by the setling in the brother; and although it be not mentioned, That it is in consideration, that he is his brother, yet being his brother, it sufficeth. And it is likewise sufficient, because the brother is to take Estate to raise Portions to his Nephews and Nieces, and also to settle Estates upon them, according to his appointment. And here is not any contingent use, but only a trust and confidence in the Covenantee to execute the Estate to his Children. But no Estate is in the Children by any Estate limited unto them. Then when all the other Covenantees joyn in a bargain and Sale to Thomas the younger son, he hath a good Estate: Whereupon by the whole Court it was adjudged for the Defendant.

Pl. Com. 307. b.

Co. lib. 7. 40. b. Moor 504. Noul. 137

Cook

Cook *verſus* Cook. 14 Car. rot. 1446.

ERror of a Judgment in Waſte. The Erroꝛ aſſigned was, Becauſe the Plaintiff declares, That the Defendant fecit vaſtum in a Cloſe in ſuccidendo three Oaks, Aſhes, and ſix Blackthoꝛn-trées growing, &c. The Jury found the waſte in ſuccidendo three Oaks, three Aſhes, and ſix Blackthoꝛn-trées, exiſtentes arbores Maeremij, and found damages jointly foꝛ them all. And Mallet moved, That it was Erroꝛ; foꝛ Blackthoꝛn-trees, cannot be timber, noꝛ is there any Waſte lies foꝛ them, unleſs they be growing in hedges, which ought to be ſpecially ſhewn; therefoꝛe the giving of entire damages was erroneous: And it is apparent, that Blackthoꝛn-trées be not accounted timber, where there be other timber trees growing in the ſame Cloſe, as 46 Ed. 3. 9 H. 6. 10. 65 & 67. But the Court (abſente Berkeley) agreed, That it is no Erroꝛ: foꝛ Blackthoꝛn in ſome Countries may be accounted timber; and being averred in the Declaration to be timber, and the iſſue found by the Verdict, it is not to be doubted but that it is timber: wheꝛefoꝛe the Judgment was affirmed. 8. 2 Ro. 819. 20.

Powel *verſus* Sheen.

PRohibition was prayed, to the Councel of the Marches of Wales: foꝛ that upon a Bill there, foꝛ a ſuppoſed Riot and Battery, to the Plaintiffs damage of a thouſand pounds, they proceeded and gave ſentence againſt the Defendant, and awarded one hundꝛed Marks damages to the Plaintiff; where, by their inſtructions, they ought not to hold plea of damages oꝛ Debt above fifty pounds. But Evers the Kings Atturney foꝛ the Marches of Wales, anſwered, That by their new inſtructions, they may hold any plea of Riots oꝛ Miſdemeanoꝛs, as the Star-Chamber may. But it was thereto replyed, That although the Star-Chamber of late time hath uſed to decree damages to the party, and the legality thereof hath not been queſtioned, being a ſupream Court, It doth not theꝛefoꝛe follow, that other Courts may aſſume unto themſelves ſuch a Juriſdiction: And although Evers ſaid, That Court is oꝛdained and eſtabliſhed by the Act of 34 H. 8. it was anſwered, That the ſaid Act doth not authoꝛiſe that Court to do moꝛe than foꝛmerly had been uſed; and whether it were befoꝛe thoſe times ſo uſed, cannot be ſhewn: Whereupon it was adjudged, That a Pꝛohibition ſhould be granted. 9. Poſt. 558, 595.

Pigot *verſus* Mary Pigot and Elizabeth Lewen. Trin. 14 Car.

APpeal of the death of his Father, whoſe heir he is, againſt the Defendants, becauſe that they, videlicet, the ſaid Mary Pigot 10. Jones 425. 1 Rol. 536.

got proditorie, and Eliz. Lewen felonicè conſpired the death of Roger Pigot the Plaintiffs father, and late husband to the ſaid Mary; And for that purpoſe, the ſaid Mary proditorie, and the ſaid Elizabeth felonicè, miniſtred unto him ſuch a kind of poyſon, in a Poſſet, which he, not knowing, drank up, and afterward within ſuch a time died; ſo the ſaid Mary proditorie, and the ſaid Eliz. felonicè, him murthered and killed. They being hereupon arraigned in the Kings Bench, pleaded Not guilty: And a Venire facias was awarded to try them at the Bar in Mich. Term. 14 Car. And after evidence apparent againſt the ſaid Mary, and doubtful againſt the ſaid Elizabeth, the Jury found the ſaid Mary Guilty, and the ſaid Elizabeth Not guilty. And now Charles Jones for the Defendant moved in arreſt of Judgment, That there was not any Declaration upon the File in the ſaid Michaelmas Term, as it ought to be. But Maynard for the Plaintiff ſaid, That this appeal was arraigned at the Bar in Trinity Term 14 Car. And the Defendants being at the Bar, inſtantly pleaded thereto the ſame Term; and ſo it is well enough without other Declaration filed, which is the uſual courſe in this Court; and that no other Declaration is to be filed. But if they had not pleaded the ſame Term, or if they had pleaded any other Plea than Not guilty, ſo as there had been adjournment unto another Term, then the Declaration ought to have been filed. And of that opinion was all the Court: And Hoddeſden the Secondary ſaid, That the uſual courſe was ſo. A ſecond Exception was taken, Becauſe there was but one Venire facias, where there ought to have been ſeveral Venire facias's in the Appeal; for they be ſeveral Offendors, eſpecially the one being charged with Treaſon, the other with Felony: And for that purpoſe vouched the Preſidents in the old Book of Entries 46 & 47. and in the new Book of Entries 57. Maynard for the Plaintiff thereto anſwered, That the Plaintiff might take one Venire facias, or ſeveral Venire facias's for doubt of challenge; and ſo is 9 Ed. 4. 27. And of this opinion was all the Court: Whereupon it was adjudged for the Plaintiff; and Judgment was given, that the ſaid Mary ſhould be burnt to death.

1 Rol. 536.

1 Rol. 536.

James *verſus* Tutney. Cujus principium ante pag. 497.

11. WAs now argued at the Bench by Juſtice Berkeley, my ſelf, and Juſtice Jones, And the ſole queſtion was, Whether, as this caſe is, damages and coſts ought to be given unto him, who juſtifies this diſtreſs as Bayliff, being adjudged for him, Or whether the giving of damages and coſts be erroneous? And Berkeley argued for the Defendant in the Writ of Error; That the damages and coſts were well given, and no Error; For by the Statute of 7 Henry 8. chap. 4. it is expreſſed, That every Avowant, and every other perſon or perſons that make Avowry, Conuſance, or Juſtification as Bayliff in

3 Cr. 329.

in a Replevin or ſecond Deliverance, for any Rent, Cuſtome, or Service, if their Avowry, Conuſance, or Juſtification be found for them, or the Plaintiff barred, ſhall recover coſts and damages, as the party ſhould have done if they had recovered. And he conceived, that by the expreſs words of the Statute he ought to have his damages and coſts; for he is within the word Cuſtomes; for he diſtrained for a duty demanded, grounded upon a cuſtome; and if not, yet eſpecially he is within the intent and equity of the Statute: For in Statutes, although particulars be enumerated, yet it excludes not, but that whatſoever is within the ſame reaſon and equity, ſhall be taken to be within the Statute. As the Statute of Weſtm. 2. de donis Conditionalibus, expreſſeth divers kinds, yet other gifts not mentioned are within the ſaid Statute: So the Co. Lit. Sect. 21 Statute 27 Hen. 8. of Joyntures, enumerates divers particular Eſtates, which are Joyntures; yet in Cok. lib. 4. fol. 1. 2. a. Vernons Caſe, other Eſtates within the ſame reaſon are within the Statute: Alſo in the Expoſition of Statutes, when the words make proviſion for certain perſons, yet they ſhall be extended by equity unto others. As the Statute of Bigamie, and the Statute of 23 H. 8. of Coſts, be expounded larger than the words. So Plowd. Comment. Partridges Caſe, Leaſe for years is within the Statute of Champarty, and the Book of 19 Hen. 8. 11. is expreſs, That the Defendant ſhall recover damages upon Demurrers, yet it is out of the words, and here as this caſe is, a diſtreſs being for a cuſtomary duty, he conceived, That damages and coſts are recoverable, as well by the Statute of 7 Hen. 8. as by the Statute of 21 Hen. 8. cap. 9. which adds, That the Avowant for damage *feſant* ſhall have coſts: But he held, That if the Lord avows for relief, or pro va- Ante 534. lore Maritagii, as he may, yet that is out of the Statute; for they be not Services and Cuſtoms, but Flowers or Fruits ſain from them; and therefore they be out of the Statute. And he cited for this 26 Hen. 8. 8. and an Avowry for an Amercement in a Leet is out of the Statute, becauſe it is not grounded upon Cuſtome, and for proof thereof he cited Co. lib. 5. fol. 78. Greys Caſe, and Co. lib. 8. fol. 38. 41. a. Greiſleys Caſe. Whereupon he concluded, That Judgment ſhould be affirmed. And the ſame day I argued the ſame way; for this being a general Statute, ought to be taken liberally to remedy the general miſchief, which was at the Common Law, That the Avowant diſtraining juſtly, ſhould be at the charge to defend his Act in diſtraining, and ſhould not be allowed coſts nor damages, to the incouragement of thoſe who tortiouſly denied their duties, ſuing out Replevins meerly for veration ſake, and in diſcouragement of thoſe who diſtrained, who by the Common Law had neither coſts nor damages allowed them for their lawful diſtreſſes; wherefore to remedy this miſchief were the Statutes of 7 H. 8. cap. 4. and of 21 H. 8. cap. 19. made, which ought liberally to be conſtrued for advancing the remedy, and ſuppreſſing the miſchief, as Cok. l. b. 3 fol. 7. in Heydons Caſe: And it ſhall be conſtrued

ſtrued according to the intent of the Makers, which intended by 7 Hen. 8. cap. 4. to give coſts to the Defendant where he prevailed, as the Plaintiff ſhould have had, if he had recovered; and although they mention Rents, Cuſtoms, and Services only, and the Preamble extends only to thoſe Rents, Cuſtoms, and Services which lie in Tenure; yet the ſecond part, whereupon this opinion is grounded, is not ſuch Rents, &c. referring to the Preamble, but all Rents, Cuſtoms, and Services: So all manner of Cuſtoms and Services are within the intent of the Statute. And I conceived the caſes concerning diſtreſſes for Relief valore Maritagij, and for
Ante 533. Amercements in Leets, to be likewiſe within the Services of 7 Hen. 8. & 21 Hen. 8. becauſe they be in nature of Services, and to be expounded as diſtreſs for Cuſtoms and Services; and therefore in the Caſe of Shepward and Mackworth, which was in Term. Mich. 44 & 45 Eliz. Where the Bayliff of the Lord Berke-
2 Cr. 28. ley diſtrained for relief: The queſtion was, Becauſe the Land had been in Ward to the Queen, by reaſon of other Lands held of her Majeſty by Service in Capite, whether the Heir ſhould pay relief to other Lands at his full age? And adjudged, That he ſhould: There damages were given by the Jury to the Avowant:
2 Cr. 28. And although Popham adviſed, becauſe it was a new Caſe, That the Avowant ſhould take his Judgment for the relief, and releaſe the damages, which he did; yet that doth not prove that no damages were due, but that it was doubted only, and there is not any reſolution nor opinion to the contrary in that caſe: Vide the new Book of Entries, fol. 570. & fol. 573. and Greiſlys Caſe, Cok. 8. Rep. fol 38. And all the Preſidents are that damages and coſts have been allowed unto the Avowants, in ſuch caſes, And therefore I concluded, That Judgment ſhould be affirmed. Jones argued to the contrary; and ſaid, we are here upon the expoſition of Statutes; and multitude of Preſidents will not ſerve for the expoſition of Statutes, unleſs after debate in Court they be mentioned to have
2 Cr. 330. been ſo adjudged: But no ſuch Preſident hath been ſhewn, but a multitude which have paſſed ſub ſilentio without debate. And for the matter he held, That it was out of the words and intent of the Statute; For the firſt part of the Statute is, Where a diſtreſs is for Rents, Cuſtoms, or Services in Lands, &c. That the Avowry ſhall be upon the Land; So that extends only to ſuch Rents, Cuſtoms, and Services by which the Land is held; and the ſecond part of the Statute of 21 Hen. 8. (which is quaſi an expoſition of the former) is, That in ſuch Avowry for any Rents, Cuſtoms, and Services, thoſe words are to be applyed to former Rents, Cuſtoms and Services; And although the words be general and ſay not ſuch Rents, Cuſtoms & Services, yet it is to be applyed to the former. And where the Statute 21 Hen. 8. cap. 19. intends further remedy than was before, it is by expreſs words, upon diſtreſſes for Damage-*feſant* and other Rents, which extend to Rent-charges, but no mention of Diſtreſſes or Avowry for any other cauſe: And in Cok. lib.

3. fol.

3 fol. 1. Marq. of Winch. Case. A Case is cited upon the Statute of 9 Rich. 2. of a Writ of Error. Where, upon a Recovery against Tenant for life, it was held, It should not extend to other Estates; and the Statute of quarto Jac. which saith, That no costs shall be given in other causes then such as are within the Statute of 23 Hen. 8. shews, That without an Act of Parliament, costs shall not be given in other causes; And for the Case cited here in an Avowry, for a Relief, damages were given, and for doubt of error released by the Avowant, it doth appear of Record that they were released; therefore it shall be intended they were disallowed by directions of the Court: And for the cases of damages and costs given in Avowry for Amercement in Leets, he knew, That anno 35 Eliz. in an Avowry for an Amercement in Leet, damages and costs being given, Judgment was reversed for that cause in this Court; Therefore he concluded, That Judgment should be reversed: Note, in his Argument he said, that in the Lord Says Case it was adjudged, Scandalum Magnatum was out of the Statute of 21 Jac. of Limitation of Actions upon the Case, and out of the Statute of 27 Eliz. of Errors in the Exchequer Chamber, because not mentioned, although it be included in the words, Actions upon the Case. Ante 142, 143.

Termino

Termino Paſchæ, anno decimo quarto *Caroli* Regis, in Banco Regis.

Memorandum, Upon Saturday the fourth of May 1639. *anno* 15 *Caroli Regis*, Serjeant *Reve*, of the County of *Norff.* was ſworn one of the Juſtices of the Common Bench, ſucceeding Sir *Richard Hutton*, late ſecond Juſtice of the ſaid Court, who died at *Serjeants Inn* in *Chancery-lane*; he was a grave, learned, pious, and prudent Judge, and of great courage and patience in all his proceedings. 1.

Cooks Caſe.

COok was endicted for the Murder of Marſhal. Upon his arraignment pleaded Not guilty, it was found, That the ſaid Marſhal was a Bayliff to the Sheriff of and had ſeveral Warrants upon ſeveral Capias ad ſatisfaciendum, againſt the ſaid Cook and his father, directed unto him and other Bayliffs; and that they, by virtue or colour thereof, entred into the ſaid Cook's Stable and out-houſe, and hid themſelves there all night; and at eight of the clock the next morning, came to Cooks dwelling houſe, and called him to open his doors and ſuffer them to enter, becauſe they had ſuch Warrants upon ſuch Writs, at the ſuit of ſuch perſons, to arreſt him, and willed him to obey them. But the ſaid Cook commanded them to depart, telling them, they ſhould not enter. And thereupon they brake a window, and afterwards came unto the door of the ſaid houſe, and offered to force that open, and brake one of the hinges thereof. Whereupon the ſaid Cok diſcharged his Muſquet at the ſaid Marſhal, and ſtroke him, of which ſtroke the day following he dyed. And whether upon all this matter he be guilty of Murder or of Manſlaughter, was the doubt? And it was now argued by Rolls for Cook, That it was not Murder; For although a Bayliff were ſlain, yet it was by his own procurement, in doing an unlawful act, viz. in breaking the windows and door, and attempting to enter and ſerve Proceſs, which is not lawful for a perſonal dutie, unleſs in the Kings caſe: And for that 2. Jones 429.

purpoſe he cited Co. lib. 5. fol. 91. b. 92. Seamains Caſe 13 Ed. 4. And after argument at the Barr, all the Juſtices, ſeriatim, delivered their opinions, that it was not Murder, but Manſlaughter only; for although he killed a Bayliff, yet he killed him not in duly executing Prozeſs: For it is not Murder, unleſs there be Malitia præcogitata, or Malitia implicita; As to murder one ſuddainly, or in reſiſtance of an Officer doing his Office; But that laſt ought to be where he is duly executing his Office, by ſerving the Prozeſs of Law, wherein he is aſſiſted, cum poteſtate Regis & Legis: But here this Bayliff was ſlain in doing an unlawful act, in ſeeking to break open the houſe to execute Prozeſs for a Subject, which he ought not to do by the Law: And although he might have entred if the dooz had been open, and arreſted the party, and it had been lawful; yet he ought not to break open the houſe, for that is not warranted by Law; and eſpecially lying there in the night, and in the mozning breaking the window and offering to foꝛce the dooz, which is not ſufferable; for under colour thereof, one may enter who hath not any ſuch authority; and every one is to defend his own houſe. Yet they all held, that it was Manſlaughter: For he might have reſiſted him without killing him; and when he ſaw him and ſhot voluntarily at him, it was Manſlaughter. But Jones ſaid, That it was reſolved by the chief Juſtice and himſelf, and the Recozder of London, at the laſt Seſſions at New-gate, in the caſe of one William Levett, who was endicted of the homicide of a woman called Frances Freeman, where it was found by ſpecial Verdict, That the ſaid Levett and his wife being in the night in bed and aſleep, one Martha Stapleton, their ſervant, having pzocured the ſaid Frances Freeman to help her about houſe-buſineſs, about twelve of the clock at night going to the doozs to let out the ſaid Frances Freeman, conceived ſhe heard theeves at the dooz offering to break them open; whereupon ſhe, in fear, ran to her Maſter and Miſtriſs, and informed them ſhe was in doubt, that theeves were breaking open the houſe dooz. Upon that he aroſe ſuddainly and fetched a drawn Rapier. And the ſaid Martha Stapleton, leſt her Maſter and Miſtriſs ſhould ſee the ſaid Frances Freeman, hid her in the Buttery. And the ſaid Levett and Hellen his wife, coming down, he with his ſword ſearched the entry for the theeves: And ſhe, the ſaid Hellen, eſpying in the Buttery the ſaid Frances Freeman, whom ſhe knew not, conceiving ſhe had been a thief, crying to her husband in great fear, ſaid unto him, Here they be that would undo us. Thereupon the ſaid William Levett, not knowing the ſaid Frances to be there in the Buttery, haſtily entred therein with his drawn Rapier, and being in the dark and thruſting with his Rapier before him, thruſt the ſaid Frances under the left breaſt, giving unto her a moztal wound, whereof ſhe inſtantly dyed: And whether it were Manſlaughter, they prayed the diſcretion of the Court. And it was reſolved, That it was not; for he did it ignorantly without intention of hurt to the ſaid Frances: And it was there ſo reſolved

2 Cr. 280. Ante 183.

Lib. 5. 92. b. 2 Cr. 486.

resolved. But here they held clearly, that it is manslaughter, because he seeing and knowing him, shot at him voluntarily, and slew him: whereupon they all resolved, It was not murder, but homicide only. Vide 13 Ed. 4. 9. 18 Ed. 4. 4.

Perkinson *versus* Gilford and others. Hill. 14. Car. rot.

DEbt, against Gilford and others, the Executors of William Collier Esquire, late Sheriff of the County of Dorset, for two and twenty pounds ten shillings. Whereas the Plaintiff had recovered in the Common Bench, against the Executor of William Pawlett, a debt of one hundred pounds, and two and twenty pounds ten shillings for damages, the debt and damages de bonis Testatoris, si &c. Et si non, the said two and twenty pounds ten shillings de bonis propriis; and the Record being removed into this Court, the Plaintiff had a Fieri facias directed to the said William Collier, Sheriff of Dorset for the levying of the said two and twenty pounds ten shillings damages of the Goods of the said Executor; and by virtue thereof he levied the said two and twenty pounds ten shillings, and afterwards dyed without paying, &c. whereupon he demanded it of the said Executors, and they had not paid it, per quod Actio accrevit. The Defendants pleaded Non debet, and found against them. And Mallet moved in arrest of Judgment, first, Because the recovery of the said debt of 122 l. 10 s. is in the Common Bench, and the Execution by Fieri facias is in the Kings Bench, and he doth not shew how it came out of the Common Bench into this Court to have Execution. Sed non allocatur; For in the Record it is mentioned, that it is here duly, which shall be intended to be by a Writ of Error, or other due means; and it is not necessary to shew all the circumstances, how it came hither. The second objection, Because it doth not appear that upon the Fieri facias awarded it was ever returned served here; so as there is no Record to charge him: For if there were any Record appearing that he had levied it, then peradventure he might charge the Sheriff. The third objection, Because he chargeth him in Action of Debt, whereas there was never any such Action brought before; but (if it had appeared by the Record, that the money was levied) he might have had Accompt, or Action upon the Case, or a Scire facias, but never an Action of Debt. The fourth objection, that although the Action lies against the Sheriff himself, yet it lies not against his Executors; For the non payment is a personal wrong, wherewith his Executors are not chargeable, As Debt upon an Escape lies not against a Sheriffs Executors. But Berkeley, Jones and my self (Brampston being absent) agreed, that the Action well lies: For to the second and third objections, the Fieri facias being duly executed and the money levied by the Sheriff, the Executor of Pawlett the Defendant in the first Action is discharged, and may aver and plead it against any new Execution to be awarded against him, as 21 H. 8. fol. 3. March. 13. Jones 430. 1 Rol. 598. 921. Moor. 468.

2 Cr. 515. Hob. 206. proves: And the Sheriff is chargeable for the money to him who recovered it. And as it is allowed that he might be chargeable in Accompt, as Mallet ſaid; ſo it is agreed, He may be chargeable in Debt; for the Plaintiff might have either Debt or Accompt, as appears in 28 H. 8. & Cok. lib. 4. 94. a. Slades Caſe. And as Berkeley ſaid, the caſe is in 1 H. 7. That a Collector by acceptance of a Talley, is chargeable in Debt, ſo the Sheriff, having levied the money, is chargeable for ſo much in Debt to him who recovered. And Mallet confeſſed, that in the Common Bench it was adjudged, Where the Sheriff returned a Fieri feci, Debt lieth againſt him. And Berkeley ſaid it was all one, when he receives the money; for he is then lyable, although he returns not the writ: For his not returning ſhall not aide nor excuſe him. And for the fourth objection, they held, that the Sheriffs Executors are as well chargeable as himſelf: For as Jones ſaid, There is a diverſity, where the Sheriff is chargeable in his life for a perſonal tort or miſfeaſance, there his perſon is only chargeable, and there Actio moritur cum perſona. But where he is chargeable for levying of money, and not paying it over, that is for a duty; and there, if he dyes, his Executors are chargeable as well as himſelf; which is the reaſon, that for an Eſcape by the Sheriff, his Executors are not chargeable. But there would be great miſchief if the Sheriffs Executors ſhould not be alive in this Caſe; for the Plaintiff had a duty due unto him from the Executors of Pawlett the firſt Defendant, who paid it to the Sheriff, and thereby was diſcharged thereof. And if the Plaintiff ſhould not recover it againſt the Sheriffs Executors, he ſhould be without remedy, which the Law will not ſuffer: Wherefore they all agreed, that the Action well lay; And rule was given to have Judgment entred, unleſs, &c.

Dier 22. a. Hob. 206.

Hob. 206.

1 Rol. 598.

R. 657. Ante 177. 1 Rol. 598. Hob. 207. 2 Rol. 410.

1 Rol. 598.

Goodwin *verſus* Anne Weſt, ante pag. 522.

4. Jones 430. March. 18. WAs now moved again by Charles Jones in arreſt of Judgment, that the Declaration was not good; Firſt, Becauſe he doth not ſhew, that he left the Writ with the Defendant; for the Statute is, If they be ſerved with Proceſs; and it is not ſerving of Proceſs when the writ is not left, although it be read unto the party, and a note left of the cauſe, place, and day. Sed non allocatur; For Jones, Berkeley, and my ſelf held it to be a ſufficient ſerving of the Proceſs within the intent of the Statute, and according to the uſual courſe and practice; For there may be two, three, or four names of Witneſſes in one writ (and ſo there be uſually) and he cannot leave the writ with every one of them, and it would be very chargeable unto the Subject to have ſeveral writs for every witneſs. The ſecond Exception, Becauſe he ſheweth that he paid unto her twelve pence for her pains, and promiſed to pay unto her as much more as ſhe would require, when ſhe came to be a witneſs at Gloceſter, which is not ſufficient, according to the Statute;

For

For the Statute is, that he shall pay sufficient charges for her travel, according to the distance of the place; and the quality of the person, so to be paid; and the Witness is not bound to accept his promise for the residue. Sed non allocatur; For when it is alledged, That he paid unto her twelve pence, and promised to pay the residue when she came to Glocester, and she accepted thereof, She is then bound to come, for she hath accepted of his promise for the residue, otherwise she might have refused, if not told him she would accept of his promise. The third Exception, Because the Plaintiff doth not shew, that he is endamaged by her non-appearance, viz. That the Verdict passed against him, or that he was inforced to be non-suited, or any other grievance; For so is the Statute, that the party grieved shall have his part of the ten pound, and his further damages tared by the Justices, before whom, &c. But Grimston for the Plaintiff answered, that the Action being brought only for the ten pounds, and not for further damages, it is well enough; and the ten pounds is due for her non-appearance to the King and the party: But all the Justices held, that the Declaration was ill for this cause; For there ought to be a party grieved by the non-appearance, otherwise there is no cause of forfeiture: And so is the express scope and words of the Statute; Wherefore it was adjudged for the Defendant, absente Brampston. Ante 522. Jones 431.

Bradsey *versus* Clyston.

DEbt, upon an Obligation of 100 l. for not performing of an Arbitrament, where the award was, That the Defendant should acquit and discharge the Plaintiff concerning a Bond of 100 l. wherein the Plaintiff and Defendant were joyntly bound for the payment of 50 l. unto J. S. The Defendant demurred, and now Rolls shews for cause, that the Arbitrament was void, to award, that he would acquit and discharge him of a Bond made unto a Stranger; For it is not in his power to procure a discharge. But the Court held, that the party may well acquit and discharge, &c. if the fifty pounds be payable at a future day, as it is here to be intended it was. A second Exception was taken, Because the submission is, to stand to the award, so as it be made under hand and seal, ready to be delivered to the parties: And he saith, That they made the Arbitrament before the day (viz. such a day) under their hands and seals; and he doth not say ready to be delivered. But all the Court held, It was well enough; For the words be not, And to deliver, but Ready to be delivered: And when it is under hand and seal, it is intended, ready to be delivered; and the Declaration being read, it was expressly, that it was ready to be delivered; whereupon it was adjudged for the Plaintiff. 5. March 18. Jones 431. 1 Ro. 248.

Daly

Daly *verſus* Bellamy and others.

6. March. 24. Jones 432. ATtaint brought by the Plaintiff in Treſpaſs of Battery: The Verdict was affirmed. And now Maynard moved for the Defendant, upon the Statutes of 21 Hen. 8. & 23 Hen. 8. That the Defendant ſhould have coſts, becauſe the Plaintiff, if he had avoided the Verdict by Attaint, ſhould have had coſts. But all the Court agreed (abſente Brampſton) that he ſhould have no more coſts: For if the firſt Verdict had paſſed for the Plaintiff, whereby he ſhould have had coſts; or if the ſaid Verdict having paſſed againſt him, thereupon he had brought this Attaint, and the Jurors had been attainted, he ſhould have had ſuch coſts, as he ſhould have had in the firſt Action, if it had been found for him; but he ſhould not have had more coſts in reſpect of the Attaint. So è converſo, where the firſt Verdict paſſed for the Defendant, and he had coſts, if the Verdict be impeached by Attaint, or be affirmed, he ſhall have no more coſts, but only thoſe which were given upon the firſt Verdict: And Hoddeſdon ſaid the practice of the Court was alwaies ſo.

Daniel *verſus* Count de Hertford. Trin. 14. Car. rot. 543.

7. R. 660. ERror of a Judgment in the Common Bench, in Treſpaſs, for depaſturing his Cloſe with Sheep. The Defendant juſtifies, Becauſe the Prior of D. was ſeiſed in fee of ſuch a great Cloſe in D. and was ſeized in fee of the Paſturage in the place aforeſaid, for all his Sheep *levant* and *couchant* in the ſaid great Cloſe, at all times of the year: The Plaintiff thereupon demurred, and it was there adjudged for the Defendant, and now Maynard for the Plaintiff, in the Writ of Error, aſſignes for Error the point of the Judgment; Firſt, Becauſe the Defendant intitles the Prior neither by preſcription nor grant; and this being a profit *a prender*, in alieno ſolo, none can entitle himſelf by the courſe of the Common Law thereunto, without grant or preſcription; & this Paſturage claimed, is but as Common in its nature. Secondly, that this plea is not aided by the Statute of 31 Hen. 8. For that gives nothing to the King, but what the Prior lawfully had; and therefore it ought to be ſhewn how the Prior was entitled thereto; wherefore, &c. Rolls for the Defendant, in the Writ of Error, ſaid, that the Plea is good; and was ſo adjudged upon Demurrer in the Common Bench; and that it was a good Plea, although it were pleaded at the Common Law, before the Statute; For this Paſturage claimed for Sheep *levant & couchant* upon the Defendants Land, is Common appendant, and cannot be ſevered from the Soil by grant; and then to make preſcription thereto, is not good, as it is 4 Hen. 6. 13 & 8 Ed. 4. And if it were not good at the Common Law, yet the Statute aids it, by pleading, that the Prior was ſeized thereof in fee, at the day of the diſſolution; otherwiſe it would be very miſchievous,

vous, the Priors and the other religious persons at the time of their dissolution, seeking to deface and suppress all their Deeds, and to conceal their Lands and Estates, which they then held: And therefore such general Averments had been allowed, as it is held in the case of the Archbishop of Canterbury, and in the Case of the Abbot of Strata Marcella, Cok.lib.9.24. And to that opinion the Court enclined; but because it was depending upon Demurrer in the Common Bench, they would not hastily proceed; wherefore day was given until the next Term. Co.2.48.b. 2 Cr.453.

The Case of Edwards and Rogers, Cujus principium ante pag.524.

WAs now argued by Maynard for the Plaintiff, and by Farrer for the Defendant; And Berkeley & my self delivered our opinions, That this Fine by Andrew, the Uncle of William the Ideot, who was seized of the Inheritance, (he dying in the life of William, so as nothing ever attached in him) shall never barr William the Defendant, who was Grandchild of the said Andrew, because he claims nothing by or from him, but only from William the Nephew of Andrew, who survived the said Andrew: And he makes his title as Heir to the said William the Nephew who was last seized, not making therein any mention of Andrew, as of one from whom he claims, but only as drawing his discent from him by way of Pedegree, and not by way of Title; And therefore it was compared to Hobbes Case, Cok. Lit. fol. 8. a. Where the Father is attainted of Felony, having Issue two Sons; and the one of them purchaseth Lands, and dies without Issue, it shall not barr the other Son to claim, as Heir to his Brother: And the corruption of blood in the Father shall not hurt him. And Berkeley compared it to the Case in the tenth of Elizabeth, Dy. 274. Where there were two Brothers; the eldest hath good cause *del petition de droit*; the youngest hath Issue a Son, and is attainted of Felony, and executed. The eldest Son dies without Issue; the Issue of the younger Son is barred of the Petition, because his blood is corrupt, and he cannot claim but by mentioning his Father, and from him, &c. But here for as much as he doth not claim, nor derive, by him, who levyed the Fine, we held, He should not be barred by the Fine: But Jones conceived: that in regard Andrew is bound, and cannot claim against that Fine, and his Grandchild cannot claim, but he ought to make mention of him, That he is also barred: And as his Grandfather, if he had survived, had been barred; so also shall his Grandchild, who of necessity ought to mention him; whereupon it was adjourned. 8. Vide N.B. Fol. 472. D.E.

Coopers

Coopers Caſe.

9. COoper being endicted in the County of Surrey of the Murder of W. L. in Southwark, with a Spit. He pleaded Not guilty: And upon his Arraignment, it appeared, that the ſaid Cooper, being a Priſoner in the Kings Bench, and lying in the houſe of one Anne Carricke, who kept a Tavern in the Rules, the ſaid W. L. at one of the Clock in the night, aſſaulted the ſaid houſe, and offered to break open the doze, and brake a ſtaple thereof, and ſwoze he would enter the houſe, and ſlit the noſe of the ſaid Anne Carricke becauſe ſhe was a Bawd, and kept a Bawdy-houſe. And the ſaid Cooper diſwading him from thoſe courſes, and repzehending him, he ſwoze, that if he could enter, he would cut the ſaid Coopers thzote: And he brake a window in the lower room of the houſe, and thzuſt his Rapier in at the Window againſt the ſaid Cooper, who in defence of the houſe and himſelf, thzuſt the ſaid W. L. into the eye, of which ſtroak he died. The Queſtion was, Whether this were within the Statute of 24 Hen. 8. And the opinion of the Court was, That if it were true he brake the houſe with an intent to commit Burglary, or to kill any therein, and a party within the houſe (although he be not the Maſter, but a Lodger or Sojourner therein) kill him, who made the Aſſault, and intended miſchief to any in it, that it is not Felony, but excuſable by the ſaid Statute of 24 Hen. 8. which was made in affirmance of the Common Law; wherefoze the Jury were appointed to conſider of the circumſtances of the fact; and they being a ſubſtantial Jury of Surrey, found the ſaid Cooper not guilty, upon this Endictment; Whereupon he was diſcharged.

Co. 5. 93. a.

Sir Martin Lyſter *verſus* Home.

10. ACtion *ſur Trover & Converſion*, of an Hawk, called a Ramiſh Faulcon, ſuppoſing that he was poſſeſſed of that Hawk, ut de bonis propriis, & caſualiter omiſit, and that ſhe came to the Defendants hand, and he knowing her to be the Plaintiffs Hawk, yet being required, had not delivered her, but converted her to his own uſe. Upon Not guilty pleaded, and Verdict found for the Plaintiff, Whytlock moved in arreſt of Judgment, that the Declaration was not good to maintain this Action, Becauſe he doth not ſhew, That ſhe was a reclaimed Hawk, and made tame, nor that ſhe had Bells or Varvells to ſhew who was her owner: And a Ramiſh Hawk is properly ſuch an one as liveth inter Ramos and from thence hath its name: And therefoze relyed upon the book 14 Eliz. Dyer 306. Sir Richard Fines Caſe. And Jones and Berkeley inclined to this opinion. But I conceived the Declaration to be good enough, becauſe it is aided by the allegation, That he was poſſeſſed of the ſaid Hawk ut de bonis propriis; and that the Defendant,

1 Ro. 5.

Ant. 19. 89.

2 Cr. 46. Moor. 691.

dant, knowing her to be his Hawk, converted her, &c. And it differs from the Case of Sir Richard Fines: For there, although the said exception was taken to the Count, yet it doth not appear but that the Count was there held to be good enough. But because the Defendants plea was held good, it was adjudged against the Plaintiff; not for the insufficiency of the Count, but upon demurrer upon the plea in bar, which was held sufficient, Vid. Cok. lib. 7. fol. 17. the Case of Swanns, of what Beasts and Birds a man may have property. This Case was afterward moved again, Termino Hillarij anno decimo quinto Caroli Regis: And then because upon divers former motions the Court was always divided in opinion, the Plaintiff for his greater expedition consented, That Judgment should be entred against him: So the Judgment was entred, Quod nihil capiat per billam. And then the Plaintiff began a new Action in the Common Bench, and amended that fault in his Declaration, and had Judgment by confession of the Action; and only three pound damages given by a London Jury: And thereupon Henden moved in this Court to have costs in his former Action: But because the Verdict was found for the Plaintiff; and upon exception to the Declaration Judgment was given against him, the Court held, That no costs should be given. Ante 175. 2 Cr. 159.

Termino Trinitatis, anno decimo quinto *Caroli* Regis, in Banco Regis.

Swyft Subchantor, and one of the Vicars Choral of Litchfield *versus* Eyres and others, Leſſees of Sir Edward Peto. Trin. 12 Car. rot.

1. Marsh. 31. Jones 435. 1 Rol. 828. 2 Rol. 52. 3.

Ante 362.

DEbt upon the Statute 2 Ed. 6. for not ſetting forth the Tythes of 140 acres of Land in Cheſterton (whereof the ſaid Subchantor and Vicar were propietors) before they carried away their Corn; For which the Plaintiff demands the treble value, viz. 135 l. Upon Non debet pleaded, it was found by ſpecial Verdict, That the Subchantor and Vicars Choral of Litchfield, being ſeized in Fee of the Rectory appropriate of Cheſterton, within which the ſaid 140 acres of Land lay and were parcel, 29 H. 8. by Indenture, demiſed and let unto John Peto the tythes of the Rectory for 42 years (with an exception of the privy tythes, the four offering days, and the tythes of a Meadow call'd the Parſons Hay, and the preſentation to the Vicaridge of Cheſterton) rendring 5 l. 16 s. 8 d. And that afterwards by Indenture tripartite, dated 26 Feb. 5 Ed. 6. betwixt the Subchantor and Vicars on the firſt part, Richard Woodward of the ſecond part, and John Woodward, father of the ſaid Richard Woodward on the third part; reciting the ſaid Leaſe of 29 H. 8. And that the ſaid John Woodward had bought the ſaid Leaſe of the ſaid John Peto, they confirmed and ratified the ſaid Leaſe; And further, for a great ſum of money unto them paid, &c. demiſed and granted to the ſaid Richard Woodward and John Woodward, all the ſaid tythes, with the tythe Hay (except the ſaid privy tythes, and the ſaid four offering days, and the preſentation of the Clerk, &c.) *habendum* from and after the ſaid term and determination thereof, and the years in the ſaid Indenture compriſed, in manner and form following, that is to ſay, To the ſaid *Richard Woodward*, for one Month after the end and determination of the ſaid term and years within the Indenture compriſed: and after the ſaid Month fully determined, To have and to hold the ſaid tythes and premiſſes (except before excepted) to the ſaid *John Woodward*, his Heirs and Aſſigns for ever, rendring 6 l. 4 s. 4 d. *per annum*. And they find, That by virtue of this Grant the tythes renewing of the Tenements in Cheſterton aforeſaid, had been injoyed always after this Grant. And further, That afterward, viz. 23 Martij, 2 et 3 Ph. et Mar. the ſaid Subchantor and Vicars Choral made another Indenture, which they find in hæc verba, mentioning, That for divers great ſums, to them paid by *Humphrey Peto*, and the rent therein afterwards to be

be reſerved, they did demiſe and grant to the ſaid *Humphrey Peto*, all that their gleab Lands lying in *Cheſterton*, *viz.* 78 acres of Land, and alſo the Demeaſns of the ſaid ſeventy eight acres, with all Profits, Commodities, Tythes perſonal and predial, whatſoever they be, or ſhall fortune to be, belonging to the ſaid Subchantor and Vicars, as Parſons and Proprietaries of the Pariſh Church of *Cheſterton* aforeſaid, as the Tythes of Pig, Gooſe, Lamb, Wooll, Calf, Fiſh, Swans, Wood, and all other Tythes whatſoever, and alſo the Tythes of the ſaid ſeventy eight acres; all which lately were in the Ferm or occupation of *Margaret Peto*, Widow, deceaſed, as alſo all other their Rights and Intereſts, Tythes, Commodities, and profits in and to the ſame, which to them do belong, or appertaining to the Parſon or Parſons, and Proprietaries of the Pariſh Church of *Cheſterton* aforeſaid (the ſaid yearly Rent hereafter reſerved, and the nomination and preſentment of the Prieſt or Curate there, with all offerings and offering days, and privy Tythes, as well of the Manor-place, as of other the Inhabitants there, always excepted and reſerved to them and their Succeſſors for ever) *habendum*, to him and his Heirs for ever, rendering annually to them and their Succeſſors ſix pounds ſeventeen ſhillings four pence. And it is found, That the Tythes of theſe Lands never were in the Tenure of the ſaid Margaret Peto. But they found, That ſome Tythes and Lands were in the Tenure of the ſaid Margaret Peto: And it was found alſo, That Sir Edward Peto is Son and Heir of the ſaid Humphry Peto, and that the Defendants were Occupiers of the Lands in the Declaration mentioned, and carried the Corn growing thereupon without ſetting out of the Tythes; Et ſi ſuper, &c. the Court ſhall adjudge it for the Plaintiffs, they find for them, and that the Tythes carried away, were worth thirty pounds per annum, and the treble value is ninety pounds; For the reſidue, they find for the Defendants. This Caſe was argued at the Bar by the Solicitor General, Rolls, and Maynard for the Plaintiff, and by the Attorney General, Serjeant Henden, and Grimſton for the Defendants: And this Term it was argued at the Bench, and two Queſtions made; Firſt, Whether the Deed of 5 Ed. 6. be good to convey the Inheritance to John Woodward? Secondly, If the firſt Indenture be not good, whether the ſecond Indenture of 2 & 3 Ph. & Mar. be ſufficient to convey them, againſt the Subchantor and Vicars, to Humphrey Peto? For if any of them be good, then the Plaintiffs have no title. And quoad the firſt, all the Juſtices argued for the Plaintiffs, That they have a good title notwithſtanding this Indenture; For this Indenture is meerly void, becauſe it is to convey an Inheritance in futuro; For the month is not to begin until the forty and two years be expired; and it is a grant of Intereſſe Termini, and no grant of a Reverſion; for the Inheriance is granted therein, which was not in Leaſe before; And as it is an Intereſſe Termini for the tythe hay, ſo ought it to be of the reſidue; for there cannot be fraction of the Eſtate: 1 Rol. 828.

And then being only an Intereſſe Termini in Richard Woodward, there cannot be a grant of a Remainder or Reverſion to commence in futuro: And to prove this, ſee Cok. lib. 2. fol. 55. Bucklers Caſe, et 8 Hen. 7. 3. et 38 Hen. 6. 34. The ſecond queſtion was, Whether the Deed of 2 et 3 Ph. et Mar. be ſufficient to convey thoſe Tythes, Becauſe they never were in the Tenure of Margaret Peto; and it was ſtrongly urged for the Plaintiff, That thoſe words in the Indenture were a clauſe of reſtriction, and declares their intent, that nothing ſhould paſs, but that which was in the Tenure of Margaret Peto. But all the Juſtices held, That it was a good Grant, and no reſtriction of the firſt words; Firſt, Becauſe there be three diſtinct clauſes before, viz. Firſt the grant of the ſeventy eight acres of gleab; Secondly the grant of the Tythes prædial and perſonal; Thirdly the grant of the Tythes of the ſeventy eight acres of gleab Land, which are all diſtinct ſeveral clauſes by themſelves. And this
2 Cr. 34. clauſe, All which, &c. doth not depend upon any of them: And Which were, &c. is a reſtriction only when the clauſe is general, and is all but one and the ſame ſentence, and not ended or certain, before the end of the ſentence, as in the Caſes of 2 Ed. 4. 29. Plow. 391. in Wrothſleys and Adams Caſe, and Plowd. 395. in the Earl of Leiceſters Caſe, But where the clauſe is not in one intire ſentence, but diſtinct and diſ-joyned from the other, as here it is, there cannot be any reſtriction: Alſo this being in the Caſe of a common perſon, addition of a falſe thing (viz. falſe poſſeſſion) ſhall never hurt the grant; For the addition of a falſity ſhall never hurt where there is any manner of certainty before, Cok. lib. 2. fol. 32. Dodingtons Caſe, & Dy. 376.
Moor 45. Co. 4. 34. Bozoons Caſe. But in the Kings grants, where there is
2 Cr. 34. falſity in point of prejudice to the Kings benefit, or a miſ-information of the Kings Title, or upon a falſe ſuggeſtion of the party; there all grants ſhall be void, as it is Cok. lib. 10. fol. 113. 21 Ed. 4. 48. 8 Hen. 7. 3. 9 Hen. 6. 28. Wherefore they all concluded, That this grant of 2 et 3 Ph. et Mar. was good; and it is to be obſerved, That although theſe words, Which were in the Tenure of J. S. when they are in one and the ſame ſentence, may be conſtrued to be a reſtriction; yet in theſe words, All which were, &c. this word All ſo diſ-joyned, cannot be a reſtitution, but an explanation; Wherefore for theſe and other reaſons, it was adjudged to be a good grant againſt the Plaintiff: But in conſideration and commiſeration of the poor Vicars, Sir Edward Peto was moved to add by way of a Rent-charge to their means; And he agreed to the motion of the Court, and added four pounds per Annum Rent for their further ſuſtentation, beſides the Rents paid unto them.

Criſp *verſus* Pratt. Hill. 10 Car. rot. 73.

Jones 437. March. 34. 1 Rol. 523. EJectione firmæ of ſixteen acres of Paſture in Chipping-Barnett. The Caſe was, That Ralph Briſco ſenior, in 19 Jac. purchaſed the Lands in the Declaration mentioned, being Copyhold, parcel of

of the Manor of Chipping-Barnett, to him and Margaret his wife, and to Ralph Brisco their son, and his heirs; And two years after he became an Inn-keeper, and received all the profits of the Land, until 4 Aug. 4 Car. at which time he became Debtor by Bond to John Brisco and others, and committed divers Acts (mentioning the Acts) which declared him to be a Bankrupt. And in 5 Car. upon a petition to the Lord Keeper, That the said Ralph Brisco senior was an Inn-keeper, and did get his living by buying and selling, and was indebted to divers persons and become a Bankrupt, The Petitioners prayed to have a Commission of Bankrupts, which was granted them: And the Commissioners adjudged him a Bankrupt, and sold this Land to the Lessor of the Plaintiff, for the benefit of the Creditors, by Indenture inrolled; which being shewn to the Lord of the Manor, he admitted him accordingly. And afterwards Ralph Brisco the father died, and the said Margaret died; and Ralph Brisco the son entred, and the Lessor of the Plaintiff entred upon him, and made a Lease to the Plaintiff for years; and the Defendant, as servant of the said Ralph Brisco the son, *ousted* him. Et si super totam, &c. the Court shall adjudge for the Plaintiff, They find for the Plaintiff; if otherwise for the Defendant. Upon this matter found, it was argued at the Bar: and this Term at the Bench: And Berkeley argued for the Plaintiff, and Brampston, Jones, and my self for the Defendant. The first question was, The Jury finding, that the said Ralph Brisco senior did get his living by buying and selling, using the Trade of an Inn-holder, and not otherwise, Whether he be a person who is a Bankrupt, and within the Statutes of 13 Eliz. 1 Jac. & 21 Jac. And Berkeley held, That he was a Bankrupt within those Statutes: For an Inn-holder is one who hath much use of buying and selling, for the entertainment of his Guests, and their horses; and running in debt by this means, it is reason he should be accompted a person within the said Statutes; and so much the rather, because the Jury find, that he got his living by buying and selling, using the Trade of an Inn-holder. But all the other three Justices argued to the contrary in this point: For an Innholder doth not get his living by selling: For although he buy provision to be spent in his house, he doth not properly sell it, but utters it at such rates as he thinks reasonable gains; and the Guests do not take it at a certain price, but they may have it, or refuse it, if they will. And if an Host take excessive prices, he is endictable. And Inn-keepers, many times, have Hay and Corn, and such things of their own growing; and their gain is not only by uttering of their commodities but for the attendance of their servants, and for the furniture of their house, rooms, and lodgings, for their Guests: And an Inn keeper is no more such a person who gets his living by buying and selling than Farmers, who buy for their provision: And the Statutes mention only those who are Merchants, and use to buy and sell in gross, or by retail; and such who get their living by buying and selling, so as their prin-

principal means is by buying and selling. Secondly, The question was, Whether a Copyhold be within the said Statutes to be sold by the Commissioners? For although it be expressly named in the Statute of 13 Eliz. in one clause, yet it is not in another; And in the Statutes of primo Jac. and 21 Jac. (upon which last Statutes this case is grounded) Copyholds be not mentioned, but generally all Lands, Tenements, and Hereditaments. But all the four Justices agreed, That Copyholds are within the intent and purview of all the said Statutes; For being in the first Statute, and the other Statutes made in further confirmation and approbation thereof, they ought to be expounded liberally, and shall be construed accordingly, to make as strong provision as they may against the Bankrupt. Thirdly, For as much as it is found, That this Land was given by the Father (two years before he was an Inholder, and six years before he became a Debtor) unto his son, and no fraud found (although there be circumstances of fraud, by the taking of the profits only, until the time he became a Bankrupt) whether it be in the power of the Commissioners to sell it? And Berkeley held strongly, That it was in their power, because it is expressly within the words of 21 Jac. That they shall sell Lands which he purchased in the name of his Wife, Children, or Friends, named and intrusted by him; And this is so purchased, But all the other Justices were of the contrary opinion: For being purchased before he was a Tradesman, and so long before he became a Debtor, is not within the Statute; for the Statute intends such persons only who gained their livings by buying and selling, and by fraud had passed away their Lands to friends in trust, and became indebted, and committed such acts of a Bankrupt, that for such acts done by them after, it should be within the Commissioners power to sell such their Lands. But here, many years before, when he was a clear man, he procured this Land to be settled upon his Son. (No fraud or purpose of being a Bankrupt being found) It would therefore be a mischievous case, and full of inconveniences, if it should be within the Statute; For none might know with whom to deal by way of Marriage or otherwise when he in not a Tradesman, and settles Land upon his Wife and Children, Bona fide, and without cause of being suspected to be a Bankrupt, and afterwards becomes a Tradesman, and then a Bankrupt, if this act should overthrow a conveyance duly settled. And for that purpose was cited, Cok. lib. 2. fol. 25. and Co. lib. 10. fol. 56. the Case of the Chancellor of Oxford, That fraud ought not to be conceived, unless it be expressly found; For Fraus est odiosa & non præsumenda. And in the tenth of King Charles, the Lady Gorges Case, Where the Earl of Lincoln purchased a Manor in that Ladies name, being his Daughter; And afterwards kept Courts, and made Leases in his own name, and always took the profits, and then sold it to Sir Sydney Montague; And the Lady Gorge never questioned it in the life time of her Father. Yet it was held in this Court, unless there

Post 568.
Jud. Rec. 112. 3.
Jud. Rec. 113. 4
1 Rol. 523.
R. 392.

there be some fraud discovered, it is not within the Statute of 27 Eliz. although there be many badges of fraud: So here; Wherefore it was adjudged for the Defendant.

Dennis *versus* John Payne senior. Hill. 14 Car. rot. 680.

DEbt, upon an Obligation of 80 l. The Defendant pleaded That the Plaintiff in the Court of Poole (being a Court of Record) had brought Debt upon the same Bond, against John Payn junior, wherein John Payn senior and John Payn junior were joyntly and severally obliged with condition for the payment of 40 l. That after a Plea pleaded, the Plaintiff entred a Retraxit, and the Defendant averred, That it was the same obligation, And that the said John Payn junior, named in the Bond, and the said John Payn, against whom the Retraxit was, is one and the same person, and demands Judgment, if against this Retraxit, he ought to sue, &c. Upon this it was demurred, and Whitlock for the Defendant argued, That this Retraxit is in nature of a Release, and quasi a Release, as it is in Beechers Case, lib. 8. fol. 58. And a Release to the one Obligor, is a discharge to the other; And if one Obligor be made Executor to the Obligee, it is a discharge for all the Obligors. So if a *Feme Obligee* takes one of the Obligors to husband, it is a discharge to them all. Rolls for the Plaintiff argued, That it is a bar only by way of *estoppell* betwixt that Obligor and the Obligee, whereof no other person shall take advantage; and it is not any release in facto, but only quasi a Release, and that this plea is no bar for the other Obligor. And I inclined to that opinion, That it is neither a Release in facto nor in Law, but quasi an agreement, That he will no further prosecute: And it may be, the said John Payn junior payed the moity of the said debt, and the Obligee agreed to accept it of him; and that he would no further proceed against him; and, being joyntly and severally bound, he might make such an agreement, and not discharge the Bond. But Berkeley held, That the Plea was good, and was a good bar; For it is a Bond joynt and several; and one of them being discharged, it cannot now be a joynt Bond; Wherefore the discharge quoad the one, is also a discharge quoad the other. But being no other Justices in the Court, it was adjourned. 3. Jones 451. March. 95. Co. Lit. 139. a. Ante 373. Ante 243.

Evelins Case.

EVelin being elected by the Parishioners of St. Thomas, to be Church-warden there with another, the Parson pretending, That by the Cannons he was to make election of the other, named one Hill to be Church-warden, and procured Doctor Clarks Official to swear the said Hill, and to refuse Evelin; Whereupon the Parishioners surmising, That they had a Custome within the Parish, time whereof, &c. to elect both the Church-wardens; And that 4. Jones 439. 2 Rol. 234.

that the Cannons cannot take away their Custome, prayed a Writ to Doctor Clark to admit the Church-warden elected by them, and to swear him, and remove the Church-warden elected by the Parson. And a president was shewn, in Jac. where such a Writ was granted, and it was said, There were divers other like presidents. And because the Church-wardens in London are, for the greatest part, Corporations and owners of Land devised unto them, the Writ was granted. And the Court (being informed, That the said Hill, elected Church-warden by the Parson, sued the said Evelin, elected by the Parish, in the Ecclesiastical Court) granted a Prohibition, to the intent it might be tried whether there were any such Custome or no.

Post 599. 2 Cr. 532.

Wolnoughs Case.

5 May 156.

WOlnough and seven others were committed by the Major of London to Newgate, for refusing to enter into Recognisance to appear before the Lords of the Councel: And upon an Habeas Corpora, returned by the Major and Sheriffs, it appeared, That by an Order from the Councel Table, they were appointed to come before the Major and Sheriffs, to treat concerning foreign matters: And when they appeared, being required by the Major being in Commission of Oyer and Terminer for the City, to perform the Order of the Lords of the Councel, and to enter into Recognisance in a reasonable sum, they refused, whereupon he committed them. And Peard, Maynard, and Keeling junior, argued, That this return was not good; First, Because it doth not mention the Order, nor shew what the Order was; so as the Court might adjudge thereof. Secondly, Because the Recognisance is demanded for them to appear before the Lords of the Councel, no time nor place appointed, nor cause shewn why it was demanded: And because the Kings Councel prayed time to maintain the return, the parties were bailed until next Term.

Arundel *versus* Mare.

6. Ante 507. Post. 558. 579.

ACtion for words. Whereas the Plaintiff was a Merchant, &c. That the Defendant said, He was a cheating Knave, and had cheated his Father by returning 20 l. for Wares, &c. It was moved in arrest of Judgment by Rolls, That an Action lies not, for calling one cheating Knave. But for as much as he was a Merchant, and it touched his Profession, Berkeley and my self, (cæteris absentibus in the Star-Chamber) held, That the Action was maintainable; Whereupon Rule was given, That the Plaintiff should have Judgment.

Ante 516. Post. 553. 570. 1 Rol. 60.

Bagnall

Bagnall *versus* Knight. Pasch. 15 Car. rot. 465.

ERror of a Judgment in the Common Bench, in an Action upon the Case, in nature of a Conspiracy. Where the Plaintiff declared that the Defendant falso & malitiosè, caused such an Endictment of Perjury to be written containing hanc falsam materiam, &c. (reciting it verbatim) and exhibited it to the grand Jury before the Justices of Peace at Westminster, and procured it to be found. And that afterwards Sir Edw. Spencer, one of the Justices of the Peace of Midd. before whom, &c. delivered it with his own hands to the Justices of Goal-delivery, and of Oyer and Terminer at the Old Bayly, for the City of London, and the County of Mid. whereby he was brought to the Bar under the Sheriffs custody, and arraigned and acquitted. And hereupon Judgment being given in the Common Bench for the Plaintiff, The Defendant brings a Writ of Error. And Worlich and Farrer moved that the Declaration was not good; First, Because it is by way of recital of the Endictment only, & they relyed upon the case of Browning and Beeston, Plowd. 136. Sed non allocatur; For it is Scribi fecit talem falsam materiam, which is a direct affirmative. The second exception, Because he doth not shew, that he was in the Goal, and then the Justices of the Goal-delivery have no power to meddle with him. Sed non allocatur; For ductus ad Barram & sub custodia, shews him to be in the Goal. 67.

Dalby *versus* Dorthall and his wife. Mich. 14 Car. rot. 415.

ERror of a Judgment in an Action upon the Case, in nature of a Conspiracy; for causing them to be endicted of Felony falsly and malitiously, and to be detained in Prison Quousque they were acquitted, ad damnum ipsorum, &c. Upon Not guilty pleaded, and Verdict found for the Plaintiffs, Judgment being given for them, the Error assigned was, Because it was ad damnum ipsorum, whereas a *Feme* cannot joyn with her husband for damages, for it is a several damage to either of them. And of that opinion was Berkley upon the first motion; For it is a several wrong to either of them: and the *Feme* may not joyn for a tort done unto her husband. But I held the contrary, Because it is grounded upon one intire Record, by which they were both prejudiced, and they may joyn if they will: Or the husband only, may have the Action for it, that he was damnified; Whereupon it was adjourned, cæteris absentibus. 8. Jones 440. Ante 175. 2 Cr. 355. 473

Child *versus* Greenhill. Trin. 14 Car. rot. 664.

TRespas for entring and breaking his Close and Fishing in Separali Piscaria sua, and for taking Pisces suas ibid. viz. 100 9. Jones 440.

Eeles, &c. After Verdict, upon Not guilty pleaded, and found for the Plaintiff and damages intire given, exception was taken in arrest of Judgment by Maynard and St. John, That the Declaration was not good, to say Pisces suas; for he hath not any property in the Fish, until he takes them, and hath them in his possession. But Rolls and Grimston for the Plaintiff said, That being they were in separali Piscaria sua, it may well be said Pisces suas; for there is not any other may take them. And of that opinion was all the Court, who severally delivered their reasons; For, for Deer in a Park, or Conies in a Warren, the owner hath a special property in them, as long as they are in the Warren or Park; So of Doves in a Dovecote. But for Deer or Conies, if they be not in a Park or Warren, he may not say suas, unless he add, that they were domestique; wherefore being taken out of his several Piscary (and not extra liberam Piscariam suam) the Action is maintainable: And it was adjudged for the Plaintiff. Vid. 43 Ed. 3. 24. 3 H. 6. 55. 22 H. 6. 59. the Register and Fitzherb.

Ante 388. Co. 7. 17. b.

R. 571. 572. 1 Cr. 195. Co. 7. 17. b. F. N. B. 89. K.

Sprigg *versus* Rawlinson. Mich. 14 Car. rot. 153.

10. March. 96. Jones 454.

ERror of a Judgment in the Common Bench, in an Ejectione firmæ of a Lease of a Messuage & unum Repositorium in Parochia Omnium Sanctorum. Habendum Tenementa, &c. from the feast of the Purification, for five years; and that the Defendant entred and ejected him from the Lands aforesaid. After Verdict upon Not guilty pleaded and found for the Plaintiff, and Judgment for him, Error was brought and assigned, that Repositorium is a personal thing called a Cupbord, which is removeable, and whereof an Ejectione firmæ lies not: Whereupon it was demurred, and very well argued by Phesant for the Defendant in the Writ of Error, and by Grimston for the Plaintiff. And Phesant urged, That Repositorium is not only a Cupboard, but also a Warehouse; and so is expresly mentioned to be in the Dictionary; And when Repositorium may be intended a Warehouse, and a real thing which may be demised, it shall be taken rather that way, than to construe it to be a Cupboard, which cannot be demised. And it was now argued by all the Justices: And Berkeley and my self held, That the Declaration is good and not erroneous; for if it had been with an Anglicè (a Warehouse,) it had been clerly good, as all the Justices agreed, and now that it is put without an Anglicè, being a good Latin word for a Warehouse, and so expressed in print, the Court may well take Conusance thereof, as of a real thing demisable; and when also 'tis mentioned with a Tenement, and an entry and ejectment made thereof: It must be intended to be a Warehouse. And when the Lease, upon which the Action was brought was shewn to the Cursitors in Chancery, who made the writ, it being a Warehouse in the Indenture, they translated it Repositorium, and well, because they had the Dictionary to warrant

Co. 10. 133. a.

Warrant it: And an Ejectione firmæ lies thereof, as well as of a Chamber, as 5 H. 7. 9. Or an Assise de Cellaria, as 24 Ed. 3. 33. Or of a Shop, as 48 Ed. 3. 4. & 14. Ass. 11. And although in Cok. lib. 11. fol. 55. Savells Case, it is held, that an Ejectione firmæ lies not of a Close; yet it was said, That the contrary had been since adjudged in Trin. 15 Jac. rot. 774. betwixt Wykes and Sparrow. And Berkeley said, that an Assise de Alneto, Bullaria, Salina, and such like, although they be incertain in the Declaration, yet because they may be made certain, is good enough: So here it is certain enough what the Plaintiff shall recover, and of what the Sheriff shall put him in possession: Wherefore we concluded, That Judgment should be affirmed. But Jones and Brampston said, they conceived the Declaration to be ill, because Repositorium for a Warehouse is not used nor known in the Law; and they never heard or read of that word for a Warehouse: And in Calepine it is said to be a Voyder; and of such words which be not usual, the Law shall not take any conusance, as they do of Cotagium, Curtelagium, Fodina, and the like which are words known at the Common Law. Wherefore they would advise. Afterwards in Hillary, 15 Caroli, because the Court were still divided in their opinions, The Defendant in the Writ of Error for his expedition, commenced a new Action, and consented, That this Judgment should be reversed.

Noy. 109.

2 Cr. 436.

Sty. 215. 3 Cr. 818. 2 Bul. 114.

Young *versus* Fowler. Hill. 14 Car. rot. 1264.

ACtion upon the Case, for disturbing him to execute his office of the Register of the Diocese of Rochester. Upon Not guilty pleaded a special Verdict was found, That from time whereof memory, &c. The Bishop of Rochester, for the time being, hath used to grant the Office of the Register for all causes within the Diocese of Rochester, as well in possession, as in reversion, for life, Habendum & exercendum by such a person to whom such grant is made, when the Office comes into possession, per se vel sufficientem Deputatum, Habendum for the life of such a person, to whom such a Grant should be made. And they find the Statute of primo Elizabethæ; and that Thomas Wardgar was Officer for his life 20. Jun. 1590. and was in possession for his life by a former Grant: And he being so in possession, John Young Bishop of Rochester eodem 20 Jun. 1590. by his Deed granted the said Office to John Young the Plaintiff, habendum & exercendum per se vel sufficientem Deputatum suum for his life, when it should be void by the death or surrender of the said Thomas Wardgar, which was confirmed by the Dean and Chapter, by their Deed 23. Jun. 1590. And they find, that the said John Young at the time of the Grant, was an Infant of the age of eleven years and six weeks and not above. But that he attained the full age of one and twenty years, in the lives of the Bishops of the

11.

March 38. 2 Rol. 1534. Ant. 279.

said Tenant for life: And that the Bishop died in 5 Jac. and that Tho. Wargar died in 15 Jac. And that the Defendant disturbed him to exercise the said Office: Et si super totam materiam, the Court shall adjudge for the Plaintiff, They find for the Plaintiff, and assess damages to 80 pounds and costs, &c. And if, &c. This Case was argued at the Barr by Maynard for the Plaintiff, and by Ward for the Defendant. The first question was, whether this Grant of this said Office to an Infant of the age of eleven years, Exercendum per se vel Deputatum suum in Reversion, after the death of a Tenant for life of the same Office, be good, or not: Secondly, Whether an Office for life, usually granted in possession or Reversion, being granted by the Bishop in Reversion, and confirmed by the Dean and Chapter, be good to bind his Successors? And as to the first, all the Justices held, That this grant of the Office in Reversion, after the death of the Tenant for life, to an Infant of the age of eleven years Exercendum per se vel Deputatum sufficientem (as the usual Grants are) is good, notwithstanding the Infancy: And notwithstanding the opinion cited in Cook Littleton fol. 3. and there said to be resolved 40 & 41 Eliz. betwixt Scambler and Walter, that the Grant of the Office of an Understewardship in possession or Reversion to an Infant, is void, because he is incapable thereof not having knowledge to execute pro commodo Regis & Populi. But this case was denied, unless it be with this difference, where it is granted with such a clause to exercise it, per se vel Deputatum. And where he is of such a tender age, that he cannot by intendment execute it by himself, as being an Infant of three or four years of age, who hath not discretion to execute it: But when there is a clause to execute it per se vel Deputatum suum sufficientem, it is good enough; for he may appoint a sufficient Deputy: And if he doth not elect such, it is a forfeiture of his Office, and a Deputy is allowed, especially in ministerial Offices, and to be approved by the Judges of that Court. And as an Infant may present to a Church, because the Ordinary gives the allowance, whether the Clerk be sufficient; So the Lord of the Manor or the Judge of the Court is to give approbation of the Deputies sufficiency: And if the Deputy misdemean himself in his Office or be unskillful, it is a forfeiture and at the Infants peril: And as an Infant may have an Office by discent as to be Sheriff or Warden of the Fleet and the like, which are Offices of charge and of trust; So he may have an Office by Grant. Nor was the Plaintiff here meerly uncapable of this Office, especially it being granted in Reversion, after the death of the Tenant for life, which fell not unto him until he had attained his full age, and was sufficiently able to execute it. Also if it had fain unto him at the time of the Grant, he was then of such age as by intendment he might have written the Acts and Orders, &c. or made election of a sufficient Deputy. Therefore they all concluded, That the Grant was good notwithstanding this exception, Vid. the cases 5 Ed. 4. 3. & 48.

R. 598. Ante 279. 2 Cr. 18. 3 Rol. 731. 3 Cr. 637. 3 Cr. 637. Ante 279. Moor 845. Co. Lit. 233. b. Hob. 142. Co. Lit. 3. b.

Dy. 150.

Dy. 150. 39 H. 6. 32. 11 Ed. 4. 1. 1 Hen. 7. 28. 9 Ed. 4. 5. & 26. Where an Office may be entailed and granted in Fée, 21 Ed. 4. 13. An Infant may be a Major; and the Acts by the Major and Commonalty shall not be avoided by the Nonage of the Major, Cok. Lit. 107. 18 Ed. 3. 3. Cok. lib. 128. 27. H. 6. Grants 12. Infant presents, Cok. Lit. 234. concerning Offices, 10 H. 6. 14. Contracts bind an Infant. The second point was, Whether the Grant of an Office for life in reversion, being usually so granted by the Bishop, with confirmation of the Dean and Chapter, be good against the Successor, or void by the Statute of primo Elizabethæ? For Ward objected, that it was void, Because it is not necessary, when there is an Officer in possession, to make another Officer: And when it is not necessary to be granted, it is void against the Successor by the said Statute, as it is held in the Case of the Bishop of Sarum, Coke lib. 10. fol. 60. 61. But the Justices resolved to the contrary. For being found to be an Office usually granted in possession for life, or in Reversion for life, then every Bishop, for his time, may grant the Office, because it is a necessary Office, and ought always to be full; so as when one dies there may be another Officer immediately to execute the said Office, for the benefit of the Kings Subjects: And when it hath been usually granted for life in reversion, as here it is found it hath, there is not any prejudice to the Successor, for he takes not any matter of profit from him, and he hath an Officer who is necessary; And the Case cited of the Bishop of Sarum well warrants it: And in the Case secundo Caroli, in the Common Bench, betwixt the Bishop of Chichester and Freedland, it was held that the Grant of an ancient Office by the Bishop, without increasing of a new Fée (it being confirmed by the Dean and Chapter) was good against the Successor. But the doubt there was, whether the addition of a new Fée made all the Grant, or only the additioned Fée, to be void? Wherefor they all resolved in this Case, That this Grant in Reversion, as it is confirmed is good; and adjudged it for the Plaintiff. Vid. Cok. lib. 9. fol. 97. Sir George Reynolds Case, Coke lib. 5. fol. 2. & 3.

Co. Lit. 43. a.

Lit. Sect. 259.

Ant. 259.

Ante 47. 8.

Seeles and others, Prisoners.

12. March. 52.

Upon an Habeas Corpus directed to the Keepers of the Porters Lodg (being the Prison for the Councel of the Marches of Wales) it being returned, that they were committed unto him by virtue of a Decrée of the said Councel, upon Information against them, That the one of them inveagled the Son and Heir of J. S. being of the age of seventeen years, in the night and when he was drunken, to marry the sister of another of the Defendants: Whereupon they were every of them severally fined to the King, some of them to an hundred Marks, some to forty pounds, and an hundred

dred Marks damages to the father who was the prosecutor, and committed to prison for a year, and until the said fines paid, and the said hundred Marks damages satisfied to the said J. S. and until they entred a Recognisance for their Good-behaviour, and until the said Court took further order: And it was returned also, That they were committed by vertue of an Order from the Lords of the Counsel. And this return was held utterly insufficient for the last part, Because it was not mentioned what was the order of the Counsel. It was also moved by Grimston, That the return was ill, to award to Prison, to remain there until further order taken, which is utterly incertain. It was likewise doubted, whether the Court of Marches might meddle with a clandestine Marriage to punish it, being a meer spiritual act: As also about the Sentence for damages to the party although it be within the express words of the Instructions, &c. Whereupon day was given until Octabis Michaelis, and in the interim the parties were bayled.

Post. 579.

Ante 318. 595.
Ante 531.
Ante 552.

Termino

Termino Michaelis, anno decimo quinto *Caroli* Regis, in Banco Regis.

Facy *versus* Lange. Trin. 7 Car. rot. 1549.

1. Jones 447. 1 Rol. 516. 585

ATtachment upon a Prohibition. The Plaintiff declares, That the Defendant sued him in Court Christian, after a Prohibition delivered, for tythes which were discharged per modum Decimandi. The first issue was, That he did not sue after the Prohibition delivered. The second upon prescription, and both found for the Plaintiff, and damages & costs given by the Jury. And now Maynard moved, that neither damages nor costs ought to be assessed, but the party is only finable to the King for the contempt of prosecuting his Suit, &c. But upon a Judgment in the Common Bench upon advisement and search of ancient presidents; where the Suit being continued in the spiritual Court after a Prohibition delivered, an Attachment issued upon the Prohibition; and because thereby the party was damnified, and put to his Suit of Attachment, which was found to be sued, the party there recovered damages and costs. So the Court here unanimously agreed, That the party shall have his damages and costs found by the Jury, and Rule was given for Judgment to be entred accordingly, unless cause, &c.

Barfoot *versus* Norton. Trin. 15 Car. rot. 1227.

2. Jones 447. 1 Rol. 635.

PRohibition for suing for divers kinds of tythes, & inter alia for Honey, surmising it was not payable, quia volatilia; and it was thereupon demurred: And now moved by Grimston, That by Law tythes are to be paid for Honey; as appears in Fitzh. Nat. Brev. 51. g. and Linwood fol. And of that opinion was all the Court; and consultation was awarded, unless cause, &c.

North *versus* Wingate. Trin. 15 Car. rot. 973.

3. Jones 447. March. 56. 61. 1 Rol. 516. 7. 574.

ERrror of a Judgment in the Common Bench in Debt upon the Statute of 1 & 2 Phil. & Mar. for taking ten pence for a distress; where by the Statute he ought to take but four pence, unless in places where it is otherwise accustomed, sub pœna forisfacturæ 5 li. The Defendant pleaded Non debet and the Jury found, Quod debet the said 5 l. and assessed damages two pence, and costs

53 s.

53 s. 4 d. And the Court increased the costs to 7 l. and Judgment given, that he should have Writ for the said 5 l. and the said damages and costs, and that the Defendant be in misericordia: And of this Judgment Error was brought and assigned by Grimston, first, That no damages or costs ought to be given because it is a penal Statute, and a penalty being given by the Statute, he ought not to have any costs and damages but the penalty only: And for proof thereof he cited Pilfords Case, Cok. lib. 10. fol. 115. That where a Statute gives single, or double, or treble damages, and doth not mention any costs, there the Plaintiff shall not recover any costs. The second Error assigned, Because the Judgment is Ideo in misericordia, where it ought to have been Ideo capiatur. But all the Court resolved, That the Judgment was good, & ought to be affirmed: For to the first, when a Statute gives a penaltie certain, and gives an Action of Debt, There if the Defendant doth not pay it upon demand, but inforceth the party unto a Suit, and he recovers by Action of Debt, ex consequenti he shall recover his damages, because he did not pay the duty due by the Statute upon demand; & he shall also recover costs, For otherwise he should be at a loss to expend more than he recovers, which the Statute never intended. But where the duty is incertain as to recover treble damages, as upon the Statute of Waste, or upon the Statute of 2 Ed. 6. for not setting forth of Tythes, there the duty being incertain, the Statute intends to give the treble value only, and not any costs: And so are the presidents in Cokes book of Entries 163. & 164. And as to the second Error the Judgment being in Debt for not payment, and not upon the Statute, the Judgment ought to be in misericordia.

1 Rol. 517. Vent. 133.

Co. Lit. 257. b. 2 Cr. 70. 2 Cr. 538. Co. 8. 60. b.

Lee *versus* Russell. Trin. 15 Car. rot. 691

4.

ERror of a Judgment in the Common Bench in Debt, upon an Obligation, conditioned, that if the Obligor accepted a Lease by Indenture of such Lands upon the Plaintiffs request, and sealed a Counterpart thereof that then the Obligation shall be void. The Defendant pleads, that the Plaintiff did not request him to accept a Lease. The Plaintiff replies, that he caused an Indenture to be drawn of a Lease, according to the said condition, and to be ingrossed, and a label to be affixed thereto, cum sera appensa, and required & offered to deliver it to the Defendant to accept thereof, and he refused. And the Issue was upon the request and found for the Plaintiff, and Judgment given. And now Error brought and assigned by Rolls, and by Godbolt Serjeant, ore tenus, first, That it was cum sera labello annexa; And sera is no Latine word for wax, but signifies a lock. Sed non allocatur; For it may be well intended for wax secundum subjectam materiam. Secondly, Because he doth not averr, that the Lands mentioned in the Indenture are the same Lands in the condition. But because he had pleaded Quòd non requisivit: And he replyed, That it was secun-

Ant. 288. 2 Cr. 139.

dum

dùm formam conditionis, therefore if they were other Lands, it ought to have been shewn on the part of the Defendant; otherwise they shall be intended to be the same Lands. The Judgment was affirmed.

Anonymus.

A Writ of Error was brought by the Bayl of a Judgment given against the Principal in the Court of the City of Westminster. The Writ was, Quòd tam in redditione Judicii, quàm in redditione Executionis, erratum fuit. And the Error assigned was, Because a Capias was awarded against the Bayl, and he taken in Execution without any Scire facias sued against him, which was a manifest Error. But an Exception was to the Writ of Error, Because the Bayl cannot have a Writ of Error of the principal Judgment: Which was agreed by the Court. But then the Question was, the Record being removed, Whether he may have a Writ of Error, Quòd coram vobis residet: And thereof the Court doubted, and would advise. 5. Ante 48 t. 1 Rol. 754. Yelv. 6. Post. 375.

Launder *versus* Brooks and others.

Ejectione firmæ of Lands in Kent, whereof Will. Brooks, being seized in Fee, holden in Socage, (and of other Lands holden in Capite) by his Will in writing, devised the said socage Lands to Brooks his base son, & the heirs of his body. The Defendant pretended there is a custom in Kent to devise Lands in Gavelkind holden in Socage. And whether there were such a custome or no, was the sole Question: For if not, the Plaintiff hath good Title: And if such Lands were devisable by Custome before the Statute of 32 Hen. 8. then the Defendant hath good title. And the Defendant, to prove the Custome, shewed Fitz. N. B. 198. L. that Lands in Gavelkinde are devisable by Custome; and Mr. Lambert fol. that Lands in Gavelkind may be given or sold without the Lords licence: And Whitfeild Serjeant said, He interpreted the word given to be by Will, and the word sold to be by Deed, and produced for Evidence, divers Wills out of the Registers Offices in Canterbury and Rochester, of Devises of Lands by Testament, in the times of the Kings, H. 6. Ed. 4. & H. 7. of several Lands in several Villages in Kent; And shews two Verdicts: The one in 9 Jac. where, in a Tryal at this Barr, the title was found for the Defendant, that it was a good Custome there; and the other Verdict 13 Car. at the Common Bench Barr, where Title was found for the now Defendant, that the Lands were devisable by Custome; And there 6. R. 581.

was a Book of Reports shewn, where in Mich. 41 & 42 Eliz. all the Court of the Common Bench agreed, That such a custome was there, But they said, this custome ought to be pleaded, and that the Land so devised was holden in Socage; For although the Court shall take Cognusance of the custome of Gavelkind in Kent, without pleading, yet of this special Custome, to devise, &c. Or that the Lands are holden in Socage, Or, That the *Feme* shall have the moity for her Dower, they ought not to take Cognusance without special pleading, they being particular customs: But for the custome of Gavelkind it sufficeth to shew, that it is in Kent, and of the nature of Gavelkind, without pleading the Custome; For the Court takes knowledge what the Custome of Gavelkind is. But Heath the Kings Serjeant, Porter, Twisden and Denn did much endeavour to disprove the said Evidence, and to shew, There was no such custome to devise Gavelkind Lands holden in Socage; and for proof thereof relyed upon the book of 4 Ed. 2. Mortdauncestor 39. That an Assise of Mortdauncestor lies not of Lands devisable. But all the Court resolved to the Contrary, That an Assise of Mortdauncestor lies of Lands devisable, if it be true that his Ancestor died seized, unless it appears, that the Defendant claims by some other Title: But if the Defendant plead, That the Land is by custome devisable, and was devised unto him, It is a good barr of the Action. Secondly, It was objected. That many Wills were made of Gavelkind Lands, where generally the Lands were in use, and in the hands of Feoffees; and many presidents were of that kind. But the Court answered thereto, That the presidents shewn were Devises of Lands, without mentioning them to be in the hands of Feoffees; And they conceived they might devise by the custome: And a president was produced out of Mr. Lambert, of a Testament of Lands in Gavelkind before the Conquest, &c. But Heath answered, It was an ill president, Because the *Baron & Feme* devised: And it cannot stand with Law, that the *Feme* should joyn with the *Baron*. And Jones Justice said, That in North-Wales there is much Land, of this nature, by custome devisable by writing, or without writing. And they for the Plaintiff shewed, That in the Common Bench, after the trial was had in this Court, there was another Tryal in the Common Bench, 11 Car. by the Knights, Esquires and Gentlemen, who found for the now Plaintiff, That there was not any such custome. But it was thereto answered in behalf of the Defendant, that the Lord Finch shewed his dislike of that Verdict. And afterwards, 13 Car. upon full evidence, a Verdict was given for the Defendants Title, That there was such a Custome, and that Land was devisable by Custome there. And afterward, the Jury here going from the Barr to consider of this matter, sedente Curia, the Plaintiff was nonsuited.

Ante 445. R. 687.

Roe

Roe and Bond *versus* Devys. Trin. 15 Car. rot.

TRespas. The parties being at Issue upon the Venire facias, one Samuel Sutton was returned, and in the Distringas he was likewise named Samuel Sutton. But upon the Panel annexed by the Sheriff, he was named Daniel Sutton of the same place, and returned and Sworn. This was assigned to stay Judgment, but the Sheriff being examined said, it was a Misprision in his Clerk, who writ Daniel for Samuel: And the Clerk being examined, affirmed as much, and that Samuel Sutton was sworn and gave the Verdict: And the Juror Samuel being examined, affirmed he was the same person who was sworn, and that his name was Samuel, and was of the same Will, and that there was not any known by the name of Daniel Sutton within the said Will; wherefore by order of Court it was appointed to be amended, and made Samuel in the Panel; for they held, that it was amendable as well by the Statute of 8 H. 6. as by the Common Law, it being an apparent misprision of the Clerk. But the Statute of 21 Jac. doth not extend thereto, but only to Sirnames mistaken. &c. which are to be amended, if by examination it may appear they be the same persons who were returned. And the Judgment was affirmed. 7.

Jones 448. 1 Rol. 197. 3 Cr. 400. 466. Hob. 128. 2 Cr. 396. 457. Co. 5. 43. a. 2 Cr. 116. Ante 203.

Reignalds Case.

ACtion for words. Whereas he was Deputy-Clerk to one Parker for divers years, who was Register under such an Arch-Deacon, and received divers Fées and Profits of that Office to render accompt. That the Defendant having communication of him and of his Office, and intending to deprive him of all his benefit thereof, & to cause him to incur the displeasure of his Master (the said Parker) and of the said Arch-Deacon, who reposed much trust in him, said of the Plaintiff, He is a base cozening Knave, he is a cheater and hath cozened his Master (the said Parker innuendo.) The Defendant pleaded Not guilty, and found against him, and damages 30 l. And now Charles Jones moved in arrest of Judgment, That these words be not actionable, for he doth not say, that he cozened him concerning his Office, and it may be intended, he cozened him in some other matter besides his Office. and then the Action lies not. But all the Court (absente Brampston) held, That the Action well lay; for it shall not be intended but that the words were spoken, concerning the execution of the Office, where the communication was concerning the Office; Wherefore it was adjudged for the Plaintiff. 8.

Hob. 76. Ante 552. 2 Cr. 504.

Proctor *verſus* Chamberlaine and two others.

9. ERror brought of a Judgment in the Common Bench in Debt, againſt them as Executors of one Chamberlaine. The one of the three Executors appeared upon the ſummons, and confeſſed the Action, and Judgment given, Quòd recuperaret debitum againſt the three Executors. And that he ſhall have Execution againſt the three Executors de bonis Teſtatoris in their hands, ſi tantum, &c. and the damages de bonis propriis of him who appeared, and miſericordia againſt all. And hereupon Scire facias iſſued into London, where the Action was laid, Et ſi conſtare poterit per Inquiſitionem, that they have waſted the goods, quòd tunc Scire faciat to them to anſwer the Debt. And upon a Devaſtavit found by the Inquiſition and returned, a Scire facias taken forth, and two nihils returned, Judgment and Execution iſſued againſt them, and Proctor was taken in Execution. And upon this Judgment, Writ of Error brought, and the Error aſſigned, Becauſe the appearance was upon the ſummons and not upon the grand diſtreſs, and therefore out of the Statute of 9 Ed. 3. cap. 3. Secondly, Becauſe it is miſericordia againſt the three, where two of them never appeared, and againſt him who appeared no miſericordia ought to be, becauſe he came in upon the day of ſummons: And for theſe and other reaſons it was reſolved, that the party taken in Execution ſhould be diſcharged.

Ante 519. Poſt. 603. Co. 5. 32. a.

Co 8. 61 b. Co. Lit. 126. b. 2 Cr. 64.

Terreys Caſe.

10. TErrey, a Merchant was endicted upon the Statute of 33 H. 8. of falſe Tokens, becauſe that he by a falſe note in the name of John Du-boys obteined into his hands a Wedge of Silver of the value of 200 l. The Defendant being found guilty, exception was taken by Charles Jones and Holbourn, againſt the ſaid Endictment for variance therein, in ſeveral words, from the Statute. But becauſe there was not any recital, nor miſ-recital of the Statute, but it was only an inducement to the ſetting down thereof, and not in any point material. The Court reſolved it to be good enough: And thereupon it was adjudged, That he ſhould ſtand upon the Pillory in Cheapſide, and upon the Pillory in Cornhill nèer to the Exchange, upon the Saturday following, and ſhould pay fine to the King of 500 l. and be impriſoned during the Kings pleaſure, and be bound with good Sureties for his good behaviour.

3 Inſt. 133.

Termino

Termino Hillarij, anno decimo quinto *Caroli* Regis, in Banco Regis.

IN this Vacation Sir *George Vernon* Knight, of the County of *Cheſter*, firſt made Baron of the Exchequer, and afterwards one of the Juſtices of the Common Bench, A man of great reading in the Statutes and Common Law, and of extraordinary memory, died at *Serjeants-Inn* in *Chancery-Lane* 16. December 1639. And upon the 18. of December following was buried in the *Temple*-Church *London*. And *Robert Foſter* Serjeant, being of the *Inner-Temple*, was ſworn Juſtice in his place 3. January 1639. 1.

Upon the 14. of January 1639. *Thomas* Lord *Coventry*, Lord Keeper of the Great Seal, died about four of the clock in the morning. He was a pious, prudent, and learned man, and ſtrict in his practice, being Lord Keeper for fourteen years and upward: He died in great honour & much lamented by all the people. And afterwards upon 18. Jan. 1639. Sir *John Finch* chief Juſtice of the Common Bench, and Chancellor to the Queen, was made Lord Keeper of the Great Seal, and ſworn the ſame day at *White-Hall*, into the Office of Lord Keeper, and one of the Privy Councel: And the next day being Saturday ſealed divers Writs at the houſe of Serjeant *Finch* in *Chancery-Lane*; And upon the Tueſday following ſealed again; And upon Thurſday the 23. of January he rode in great ſtate to *Weſtminſter*, the Lord Treaſurer and the Earl of *Mancheſter* riding on each ſide of him, and accompanied by the Earl Marſhal, the Admiral, the Earl of *Strafford* Lieutenant of *Ireland*, and by divers other Earls, Vicounts and Barons, and all the Juſtices of both Benches, and Barons of the Exchequer, and the Gentlemen of the four Inns of Court, and divers others attending upon him.

Upon the ſame day being the firſt day of the Term, Sir *Edward* *Littleton* Solicitor (who had his Writ to be Serjeant the ſame day, to the intent he ſhould be made chief Juſtice of the Common Bench) appeared in *Chancery*, and was ſworn Serjeant; and upon the Saturday following performed all the Ceremonies of a Serjeant, as well in his apparel as otherwiſe, and gave Rings, *quorum Inſcriptio fuit* Poſt. 600. C. 5.

And *Brampſton* chief Juſtice made a ſhort ſpeech, declaring to him the duty of a Serjeant, but did not much inſiſt thereon, becauſe he was to be chief Juſtice of the Common Bench.

Dawſon

Dawſon *verſus* Lee. Mich. 15 Car. rot. 585.

2. Co. Lit. 128. b. DEbt *ſur* Contract. The Defendant after Imparlance pleaded Outlawry in Barr. The Plaintiff ſaith *Nul tiel Record*. And the Defendant had a day to bring in the Record and failed therein. The queſtion was, what Judgment ſhould be given? For Hoddeſdon ſaid, that in the time, when Tanfeild was their Judge, they held, That if the Defendant after Imparlance had pleaded Outlawry, and upon *Null tiel Record* pleaded, had failed of the Record, Judgment ſhould be abſolutely given, and not *a Reſpondes ouſter*. And Berkeley and my ſelf conceived it ſhould 2 Cr. 484. be an abſolute Judgment, for as much as he had pleaded in Barr and did not anſwer over. But Berkeley ſaid, If the Plaintiff would pray only, that he ſhould be awarded to anſwer over, he might ſo pray; for it is his delay only and no Error. But the Plaintiff, by his Atturney prayed to have it abſolutely, and ſo it was awarded, unleſs other cauſe ſhould be ſhewn the Wedneſday following: And after Dinner in Serjeants Inn, Brampſton chief Juſtice and Jones (who were that day in the Starchamber) being informed of this caſe, were of the ſame opinion: And ſo were Damport chief Baron, and all the other Juſtices and Barons, to whom it was propounded.

Stevens Caſe.

3. ONe Stevens and Alice his daughter were endicted at the Seſſions of the Peace in the County of Cambridge, before the Juſtices of Peace there; becauſe the ſaid Alice feloniouſly ſtole a Rake and Fork of the value of 3 s. and a Rope of the value of 18 d. and that Stevens the father knowing thereof, received and comforted the ſaid Alice, and ſo was acceſſary. And hereupon they were arraigned, and pleaded Not guilty: And by means of one Spicer the under Sheriff, who returned two of his Servants to be of the Jury (as appeared by Affidavit of ſome of the Jurors) They were found guilty, and Alice the principal, becauſe the goods were under value, and, according to the Statute, was awarded to be burned in the hand, and that ſhe ſhould forfeit all her Lands and Tenements, Goods and Chattels: And againſt the ſaid Stevens Judgment was given, (becauſe he had prayed his book and was returned Legit ut Clericus) That he ſhould be burned in the hand, and ſo it was done immediately to them both; and that he ſhould forfeit all his Lands and Goods, and preſently the under Sheriff ſeized the Lands, and alſo the Goods and Chattels of the ſaid Stevens, being of the value of 500 l. and returned into the Exchequer, that he ſeized his Goods only, to the value of 3 s. (as it was informed at the Barr.) And upon this Judgment Stevens brought a Writ of Error: And Grimſton being of Counſel with

with the Plaintiff assigned Error in the Judgment. And Berkeley and my self being only in Court, upon reading of the Record held it to be manifest Error; for the principal not being attained but discharged by burning in the hand only according to the Statute, the accessary ought to have been discharged without any burning in the hand, and without being put to his Book; for where a man is principal, & another is accessary unto him after the fact, and both of them be convicted, if the principal prays his Clergy and hath it allowed, & be burnt in the hand, because he is returned Legit, &c. the Accessary is to be discharged, without being put to his Book; for he ought not to be condemned, but where the principal is attainted, and not where he is convicted only, and had his Clergie, and so is the common experience and practice. Also the Judgment is erroniously given, Because it is that he shall forfeit his Lands and Tenements, after such conviction and Clergie allowed, Wherefore the Judgment was reversed: And the Clerk of the Crown was appointed to draw an Information upon this misdemeanor for the procuring of the said Stevens in such an undue manner to be convicted. 3 Inst. 114. 139. Co. 4. 43. b.

Crawleys Case.

CRrawley being brought to the Barr upon an Habeas Corpus, directed to the Major of St. Albans, being in Gaole there, It was returned upon the Writ, that he was committed to the Gaole by the Justices of the Peace of the said Liberty, at the Sessions of the Peace holden 11. Julii 1639. till he should obey an Order of taking the Office of Constable upon him; for that he being an Inhabitant within the hundred of Casho, within the Liberty of St. Albans, had refused to execute the said place: And because it was informed on the part of the said Crawley, that he denied to be within the Liberty of St. Albans, but affirmed that he was within the County of Hertford, out of the said Liberty, All the Court held, That he was unjustly committed, because they ought not to have committed him, when he denied to be Constable, especially pretending that he was not within the Liberty: But should have caused him to be endicted upon this refusal, and if he were found to be within the Liberty, should have assessed a good fine, and then have committed him for that cause, Vide Cok. lib. 8. fol. 38. b. Greisleys Case. But as it is now returned, the imprisonment was not lawful; Wherefore the said Crawley, by the opinion of the whole Court, was absolutely discharged without any Bayl. 4.

UPon Monday 27. January 1639. Sir *Edward Littleton* & *Robert Foster* appeared at the Common Bench Barr, and were placed in the midst of the Barr; And Sir *John Finch* Lord Keeper of the Great Seal, came into the Common Bench, and made a long and eloquent Speech to them both, signifying the Kings pleasure, to make

Sir

Sir *Edward Littleton* chief Justice of the Common Bench, for his good and long service, and his certain knowledge of his abilities to serve him: And the said *Robert Foster* to be *puisne* Judge there, for his good opinion which he conceived, and the good report he had heard of him: And afterwards both of them made several speeches, giving thanks to the King, and signifying their willingness of endeavouring to perform their service to the King and his People, according to the utmost of their skill and abilities in their several places.

Parker *versus* Edith Bleeke. Hill. 13 Car. rot. 1002.

6. Jones 451. TRespas. Upon Not guilty pleaded, a special Verdict was found, that the Land was Copyhold Land of Inheritance of the Manor of Cheltenham in Glocestershire, whereof one Arthur Bleeke, late husband of the Defendant, was seized in Fee, within which Manor is this custome (amongst others,) that if a Copyholder seized in Fee of a Copyhold-Tenement dyeth, having a wife at the time of his death surviving him, that she shall have and hold the said Copyhold Land during her life, and for 12. years after, and found the Statute of 13 Eliz. of Bankrupt, and the Statute 1 Jac. And that, upon complaint of the Creditors, a Commission issued upon those Statutes directed to Warren and six other Commissioners, to inquire whether he were a Bankrupt: And if they found him to be a Bankrupt, that they, or three of them (whereof the said Warren should be one) should execute the Commission according to the Statutes. That hereupon the said Warren and three others, upon complaint of the creditors, examined the matters and adjudged him to be a Bankrupt; and found that he was seized Ant. 550. in Fee of the said Copyhold, which was apprised to be sold to the value of 600 l. That they by Indenture 5 Aprill, 10 Caroli, inrolled within the six months, reciting the causes wherefore they adjudged him to be a Bankrupt, bargained and sold the said Copyhold Land to Arthur Parker & William Sothern, and their Heirs, for 600 l. payed and secured to be paid, for the use of the Creditors of the said Bankrupt. And they find a private Act of Parliament, made 1 Caroli, whereby the Customes of the said Manor are cited and established; and amongst others this Custome is mentioned and confirmed That the wife of the Copyholder shall have Dower, & may have a Joynture assigned for her life: And that a Copyholder of Inheritance may make a Grant for his life and twelve years after: And it is therein provided, That all women now living, and late the wives of any the Copyholders of the said Manor, dying Tenants, and all the now wives of any the Copyholders of the said Manor, shall and may enjoy the Customary Lands of their now or late husbands, and be Tenants for their lives and twelve years after, as if this Act had never been made. And in the end of the said Act is a general Clause: Be it enacted, That all Customes and Usages heretofore used and allowed within the said Manor, concerning the having

having or enjoying of any the ſaid cuſtomary Lands or Tenements, by any widow of any cuſtomary Tenant of the ſame Manor, or by any after-taken husband of ſuch widows, or the Heir or Heirs of ſuch wife hereafter taking husband, or concerning the deſcending of any ſuch Lands to any other perſon, or in any other manner or form than is before expreſſed, ſhall be utterly void and of none effect: And that all other lawful Uſages and Cuſtomes heretofore uſed within the ſaid Manor, which are not repugnant and contrary to the true meaning of this Act, ſhall be and remain good and effectual, and are and ſhall be ratified by this Act: They further find, that at a Court Baron of the Manor, 1 April, 12 Car. it was found by the Homage, that the ſaid Edith ſurvived her ſaid husband, and ought to enjoy the ſaid Tenements, in which, &c. for term of life of the ſaid Edith, and for 12. years after: And that upon a preſentment afterwards, viz. the aforeſaid 1 April, 12 Car. and before the admiſſion of the ſaid Alexander Parker and Will. Sothern into the Lands, in forma prædicta facta, the aforeſaid Edith was admitted Tenant of the Tenements aforeſaid, in quibus, &c. ſecundum conſuetudinem Manerij prædicti quodque virtute admiſſionis prædictæ prædicta *Editha*, &c. tempore quo, entred, &c. And this was very well argued at the Bar by Glyn for the Plaintiff, and by Moreton for the Defendant, where two points were inſiſted upon: Firſt, Whether by the bargain and ſale made by the Commiſſioners, by virtue of the Statute of Bankrupts, the Eſtate of the Copyholder was veſted in the Bargainee before admittance, although he might not enter before admittance, for then the ſaid Arthur Bleek did not dye tenant, and ſo is not within the Cuſtome that his wife ſhould 2 Cr. 36.
have widows Eſtate? Secondly, Admitting he died tenant, and the widow had ſuch an Eſtate veſted in her, Whether the Vendees (by the bargain and ſale to them before made) ſhall not afterwards devеſt the Eſtate of the *Feme* by relation, and then the Plaintiff hath a good title? And Berkeley and my ſelf argued, That the Judg. Rel. 161.
bargain and ſale binds the Copyholder and bars his Eſtate, and that he is no Copyholder after the bargain and ſale enrolled: And the Bargainee by the Statute is only barred to take the profits, Ante 283.
until admittance, which is for the Lords benefit in reſpect of the fine due to him thereupon. Secondly, We held, when the Bargainee is admitted by the Lord, It ſhall veſt in the Bargainee, and ſhall have relation to the bargain and ſale, and ſhall devеſt the Eſtate which the *Feme* claimed by the Cuſtome, as in the caſe of 7 Ed. 6. Brook, title Inrollments, Where one Joyntenant bargains and ſells, and before the Inrollment the other dies, and afterwards the Deed is inrolled within the ſix Months: Ante 217.
yet the moity only paſſed, and it is like the caſe where one bargains and ſells by Indenture and takes wife and dies, and afterward the Deed is inrolled within ſix Months, the *Feme* Ante 217.
ſhall not have her Dower, and ſo the caſe 22 Eliz. where Mortgagee dies, his Heir being in Ward to the King, the con-

condition is afterward performed, the Wardship shall be divested. Jones and Brampston doubted of the point, until they saw that the Record finds the Act to be particularly, that she ought to be the wife of a tenant; And it is not intended, that after the sale of the Copyhold, he should dye tenant; and he did not dye tenant, because the bargain and sale took his Estate from him, and *ousted* him of the Copyhold. Wherefore they agreed, Judgment should be entred for the Plaintiff.

Judg. Ref. 161.

Bathells Case. Hill. 9 Car. rot. 958.

7. ERror of Judgment in the Grand-Sessions, before the Justices in the County of Flint. Divers Errors were assigned and over-ruled in Michaelmas Term last; And now two Errors only insisted upon. First, That the Judgment was, Coram Justiciariis in Comitatu *Flint*; and he doth not say Magnæ Sessionis in Comitatu *Flint*. Sed non allocatur: For there be many of their Records as well the one way as the other, and good both ways. Secondly, because the Venire facias was returned per Thomam Hamond Militem, nuper Vicecomitem of the said County; So it was not returned by the Sheriff, but by one who was late Sheriff; And it appears not that he was Sheriff at the time of the Panel made; For he ought to have subscribed his name, Thomas Hamond Vicecomes; which Error is not aided by any Statute. Sed non allocatur; For although the Writ be returned by J. S. the Sheriff, at the time of the Grand-Sessions, when the said Action was tried, as a Writ delivered unto him by the said Thomas Hammond his predecessor, in exitu ab Officio suo, with this return indorsed; yet it might be very well intended, That the Panel was made, and annexed in the time when he was Sheriff: and this addition, Thomas Hamond nuper Vicecomes, is sufficient proof, when he is discharged of his Office: Whereupon the Judgment was affirmed.

Post. 572.

Ante 189.

Ireland *versus* Lockwell. Trin. 15 Car. rot. 1181.

8. ERror upon a Judgment in Bathe, in an Action of the Case for words. Whereas the Plaintiff was a Taylor, and used and exercised the Trade of a Taylor in Bathe, and was a Freeman of the said Town, and had divers Customers in the County of Wilts, who used to imploy him in his Trade, That the Defendant at Bathe, within the Jurisdiction of that Court, said of him, That he cheated in his Trade, and other such words, much slandering him in his Trade, by which means he lost divers of his Customers in Bathe, and in the County of Wilts; and they withdrew themselves from him, to his damage, &c. The Defendant pleaded Not guilty, and found against him, and damages assest to 100 Marks, and Judgment for the Plaintiff; and Error thereof brought and assigned, That the words were not actionable: But it was clearly held, That they were actionable.

Jones 450.

Ante 552.

actionable. Then it was moved by Grimston, That the Jurors in Bathe (being within a private Jurisdiction) ought not to have assessed damages, for the loss of his Customers in the County of Wilts: And Berkeley much insisted upon it, that for this cause the Judgment was erronious, as it was resolved in the Case, where an Assumpsit brought in Windsor Court, by one within the Jurisdiction thereof, That J. S. upon a valuable consideration, did promise to bring unto him so many loads of Billets from Hedsset, in the County of Bucks, unto Windsor. After Verdict, upon Non assumpsit pleaded, and found and adjudged for the Plaintiff, the Judgment was reversed, Because, it being a private Jurisdiction, they have no authority to inquire of any matter out of the same. And Jones, Brampston and my self agreed that Case to be Law: But we held, That this is only an Allegation, in respect of damages, for the increase of them, which they may inquire of in any place whatsoever: wherefore the Judgment was affirmed. 1 Rol. 545. R. 134. R. 398. 1 Rol. 546.

9.

ERror of a Judgment in the Court of the Marshalsey in an Action upon the Case upon a promise, at the Parish of St. Clements Danes, within the Jurisdiction of that Court, in consideration of such a sum received, That he would pay him such a sum when he returned into England from Hamborough, (being a place beyond the Seas;) And alledges, That he, such a day, went over Sea, unto Hamborough aforesaid; and returned such a day, to the Parish of St. Clements Danes, and that he demanded the money, and the Defendant had not paid. After Non assumpsit pleaded, Verdict and Judgment for the Plaintiff, Error was brought and assigned, First, Because he doth not alledge, That he gave notice unto the Defendant of his return: And although it be alledged, That the Defendant habens notitiam inde, and upon such a day requested, had not paid; yet it was held clearly, That the Declaration was insufficient for this cause; For he ought to have alledged express notice, and shewn the day and place of such notice given. Secondly, Because it is brought of an act to be done at Hamborough, out of the Jurisdiction of the Marshals Court, being a private Jurisdiction; which was held also to be a manifest Error: For which causes the Judgment was reversed. 1 Rol. 469. 2 Cr. 150. 2 Cr. 150. 2 Cr. 57. Hob. 68.

Scavage *versus* Hawkins.

10.

FRror of a Judgment in Debt, upon a Lease for years. The Error assigned was, Because the Plaintiff in debt counts, That his Father was seized in tail, and made that Lease for years, rendring rent, and died seized of the Reversion, which descended unto him, as Son and Heir of his body; And doth not shew the beginning of the said Estate; which generally ought to be set forth, where he claims by a particular Estate, (otherwise it is where he counts of a seisin in Fee;) But because this was in a Count, and not in Bar; nor Jones 453. 3 Cr. 18. Co. Lit. 303. b. Post. 575. 1 Cr. 52. 103.

in an Avowry, and there were produced presidents out of the Common Bench, that such Counts are usually there: It was therefore held to be no Error; And the Judgment was affirmed, 21 H. 7, 26. 34 H. 6, 48. 2 Ed. 4. 11.

Bryan *versus* Wikes.

11. ERror of a Judgment in Leicester in an Action upon the Case for words: The first Error assigned by Babington, because the stile of the Court, was, Placita coram *J. S.* Majore, & *Joh. Chapman* Recordatore, & *J. D.* & *J. N.* Aldermannis Burgi prædicti secundùm consuetudinem Burgi prædicti, &c. And the plaint being entred, upon summons, a non est inventus was returned at a Court holden, coram dicto *J. S.* Majore & *J. N.* & *J. D.* Aldermannis secundùm consuetudinem Burgi prædicti, &c. omitting the Recorder, which Babington alledged to be Error, & coram non Judice. Sed non allocatur; for it may be that at the first Court holden, the Recorder was there, and at the second Court, he was absent, and the Court is well held by the Custom there, before the Major and two Aldermen. The second Error assigned was, Because the Judgment there is in an Action for words, which the Defendant spake of the Plaintiff, viz. He hath stoln a Tree formerly cut down, which is Felony, and I will cause him to be endicted for Felony. Babington alledged, That the words were not actionable, because he doth not shew, when the tree was cut down, Nor that there was some space of time between the cutting and taking away, for if it was not taken away instantly after the cutting it was not felony. Sed non allocatur; For the words are clearly actionable. For when he saith, That he stole a Tree, formerly cut down, it is intended to be a long distance of time, especially when he adds, And that it is Felony, and I will endict him of Felony; for it shews, He conceived he had committed felony, which was a great slander; Wherefore the Judgment was affirmed.

Ante 570.

2 Cr. 114.

R. 131.

2 Cr. 331.

Owen *versus* Long and others. Mich. 15 Car. rot. 571.

12. TRespass of Assault, Battery, and Imprisonment, apud Parochiam Sancti *Nicholai* in *Basingstreet* for two days, The Defendant justifies by reason of especial Act of Parliament, for the relief of poor Debtors, 3 Jac. cap. 15. whereby it was enacted, That every poor Citizen and Freeman inhabiting in London, being sued for Debt under 40 s. may exhibit his suit in the Court of London, called there the Court of Requests in London, who shall nominate Commissioners to the number of 12. and that any three of that Commission may send for any Creditor, who is complained of, in suing for such a Debt under 40 s. and if he refuse to come, or perform not their Orders, They may cause him to be arrested by any Serjeant of London, and commit him to Prison, there to remain, until he perform the said Order. And the Defendant saith, That by

by reason of the command of such Commissioners, at such a Parish in Woodstreet, because he refused to come before them, he was committed to the Compter in Woodstreet, Et hoc paratus est verificare. Upon this, the Plaintiff demurred: And now Phesant for the Plaintiff took divers exceptions to the Plea: First, Because he doth not shew, that the Debtor, who complained was poor and a Citizen and Freeman inhabiting in London, otherwise the Act doth not give them authority to meddle. Secondly, Because the Battery and Imprisonment is alledged in Parochia Sancti *Nicholai*, and he justifies in another Parish, and doth not travers the Battery and Imprisonment alledged in the Declaration. Thirdly, The conclusion of the Plea is not well, Et hoc paratus est verificare, where there be two Defendants, for it ought to have been parati sunt, &c. Ant. 228. Post. 594.

Martyn *versus* Nichols.

ERror of a Judgment in an Ejectione firmæ. The Error assigned, Because the Declaration was of a Messuage and 40 acres of Land, Meadow and Pasture thereto appertaining, and it was not distinguished how much there was in Land, how much in Meadow, and how much in Pasture; Therefore the Judgment was reversed. 13. Ante 179.

Canwey *versus* Aldwyn. Mich. 15 Car. rot. 132.

ASsumpsit. Whereas the Plaintiff at the Defendants request, amended such a Boat, and divers other Boats of the Defendants, That the Defendant promised to satisfie and pay him for his labor and charges about the amendment of the said Boats, tantum quantum meruit, and alledges in facto, quòd meruit 30 l. and that he required the payment of the Defendant, who had not paid him according to his promise. The Defendant pleaded Non Assumpsit, which was found against him. And now moved by Grimston in arrest of Judgment, that the Declaration was not good, because he alledged, That he amended and repaired divers Boats for the Defendant, and shews not what, so by reason of that incertainty, the Defendant cannot know how much he should pay, and therefore compared it to Playters Case, Cok. lib. 5. fol. 34. Tresp. quare Pisces suos cepit, and adjudged ill, for the incertainty. And of that opinion was Berkeley at the first, but upon better advisement, and reading over the Record, That he mended one and divers others, And upon a president cited by my self, that an action had been maintained here by a Taylor, for making a Gown and divers other suits of Apparel at the Defendants request, and that he promised to satisfie and pay tantum quantum, &c. And Hoddesden affirming there were divers presidents in the Court of this nature. Jones, Berkeley, and my self agreed, That the Declaration was good, and there was not any such incertainty, but that the Defendant (at whose 14. Ante 77. Yelv. 111. 1 Cr. 435.

whose request the said Boats were amended) might well take Conusance, what Boats he desired to have repaired: And the Verdict finding quod Assumpsit, and assessing damages, Judgment was given for the Plaintiff.

Anne Healings Widow *versus* the Major, Commonalty, and Citizens of London.

15. 1 R. 206. ERror of a Judgment in the Common Bench in Debt, brought by them upon an Obligation of 400 l. The Error assigned was, because the Judgment is, That the Major, Commonalty and Citizens of London, should recover the Debt and six pounds for Costs, eisdem Majori & Communitati adjudged (omitting Civibus) and so no such Corporation: which was held to be Error. But afterwards upon a motion in the Common Bench, and upon examination and perusal of the Dogget-Roll (where it was well entred) it was awarded to be amended.

Ante 410. 2 Cr. 628. Moor 859. Hob. 127. Post. 581. 594.

The King *versus* Sir John Dryden, Gybbs, and others.

16. Ante 511. Jones 452. RIght of Advowson against them as Coparceners. Upon a speciał Verdict by the grand Assise, It was shewn that the Tenants were Coparceners, and that Margaret Gybbs one of the Tenants were dead *puis darraigne continuance* before this Term, which was pleaded in abatement of the Writ. Hereupon the Kings Atturney traverseth, that they were Parceners: And upon that it was demurred: And being moved in Court, it was adjudged without argument, That the Writ should abate, and appointed, that Judgment should be so entred: For all the Court agreed, although it were admitted, they were not Coparceners, but Joyntenants, yet the death of one of them shall abate the Writ being in a real Action: and it is not like to the case of an Assise of novel disseisin, or of an Assise of Mortdancester, Where death of one of the tenants shall not abate the Writ, as long as there is a tenant living; for it is here allowed that every of them is tenant of a Freehold: And although the Atturney General affirmed there were two express Books in the point, viz. 13 Ed. 3. tit. Breve, 260. & 27 Ed. 3. 83. Yet upon view of the said Books, they conceived, they do not extend to this case; for it was only in a Scire facias upon a *Petition de droit*, which differs from this Case, Vide 7 H. 4. 33. temp. Ed. 1. Breve 857, 858. 40 Ass. 15. 1 Ass. 12. 1 Ed. 3. 12. 6 Ed. 3. 270. 7 Ed. 3. 300. 43 Ed. 3. 16. 12 H. 6. 2. But it was afterward adjourned by Master Atturneys importunity until Easter Term, pretending that he would then argue the Case. Postea pag. 583.

Ante 509. Post. 589. Ante 426.

Smith *versus* James.

17. 1 Rol. 792. ERror of a Judgment in the Court of the Palace of Westm. by the Principal and Bail: The Error assigned was as well in

in the principal Judgment, as in the Execution against the Bail. And it was moved by Grimston, That therefore the Writ of Error was not well brought: And all the Court were of the same opinion; whereupon the Writ of Error was abated, then they brought several Writs of Error quæ coram vobis Resident. And the Error assigned by the Principal was, That the Declaration was ill, and upon reading of the Record, it appeared in his Declaration, that upon 23 Decemb, 13 Car. in consideration of such a sum of money. The Defendant assumed and promised, That he 23 January, 13 Car. would pay such a sum of money to the Plaintiff. And because it appears by his own shewing, That this Action was brought before there was any cause of Action, the Court held, That the Declaration was ill, and the Judgment (although it was after Verdict for the Plaintiff) was erronious, and therefore reversed: and then the Writ of Error by the Bail is not examinable, but falls of it self.

Ante 300. 408. 2 Cr. 384. 135. Hob. 72. 3 Cr. 155. Ante 561. 1 Rol. 792. 3 Cr 325. 2 Cr. 70. Hob. 199.

Sands *versus* Trefuses.

18. Action upon the Case, for stopping a Water-course running to his Mill, And declares, That he was seized in Fee of a Mill, and had a Water-course running in the Defendants Land, to the said Mill, and that the Defendant had stopped his Water-course, The Defendant pleads a vitious Plea; whereupon the Plaintiff demurred: And now Beare for the Defendant moved in arrest of Judgment, That the Declaration was ill, because he doth not declare that his Mill was an ancient Mill, and that the Water-course, was an ancient Water-course, nor doth he prescribe to have a Water-course in the Defendants Land. But all the Court held it to be well enough, and may well maintain his Action upon the Case, being lawfully in possession, and the stopping of the water is toxtious, and a damage to his Mill, and although he doth not shew que Estate, that is not material: and it hath been divers times so ruled, viz. 33 Eliz. betwixt Sly and Mordant. But because this was moved the last day of the Term, day was further given until the next Term.

Ante 500. Ante 571. 2 Cr. 43. 1 Leon. 247.

Earl of Oxford *versus* Waterhouse.

19. ERror. After a special Verdict and argued at the Bar, there was a Discontinuance entred by the Plaintiff, as it was agreed he might: It was moved, That costs might be assessed for the Defendant. But the Court doubted whether costs might be assessed, Because there was no Verdict given in the case.

2 Rol. 713. R. 689.

The Major and Commonalty of London *versus* Alford.

20. TRespass. Upon a special Verdict, upon Not guilty pleaded, and tried at the Bar, the Case was, One Sir George Monox,

Jones 452.

nox formerly Major of London, being seized in Fee of 20. Messua-
ges in London, holden in Burgage, where the Custome is, that they
Ante 284. be deviseable, as well in Mortmain, as otherwise, erected an Alms-
house and a School-house in Walthamstow, in the County of Essex;
and for the maintenance of the same Alms-house, School-house, and
a Chappel there, he devised by his Will in writing, 33 H. 8. those
Tenements, whereof one of them is now in question, to Giles
Briggs, Roger Alford, and four others, whom he made his Execu-
tors, Habendum to them, their Heirs, and Assigns: Reciting, That
whereas he had erected an Alms-house in Walthamstow, for 13. poor
People, and a School-house and Chappel there, he devised those
Tenements to the said six persons and to their Heirs and Assignes,
upon condition, and to the intent and effect, That his said Executors
and Feoffees, their Heirs and Assigns, should pay out of the issues
and profits of the said Houses 42 l. 7 s. 4 d. in manner and form fol-
lowing, viz. to an honest Priest which shall be School-master, and
teach Children, 6 l. 13 s. 4 d. yearly; and also pay weekly to the poor
Alms-people there 7 d. a piece, and 5 s. yearly to be bestowed upon
an Obit; and to pay to an able Clerk, to help to teach the Children
there, 26 s. 8 d. and other charitable uses: And if any part of the said
2 Cr. 592. purposes remained undone and unperformed, Then they find, That
he devised the same to William Monox, and to the Heirs males of
his body, upon condition, and to the intent to perform all the said
Co. 4. 105. a. R. 726. trusts and purposes: And if he failed for two months, then he de-
vised them to the Major and Commonalty of London, upon the same
conditions, and to repair London bridge: And if they failed, That
his Heir should enter and perform the same, and by a Schedule an-
nexed to his Will, he appoints and adds, some other conditions to
the said Estate, and appoints, That none of those Devisees
should hold by survivor, but that the Heir of him who died, should
have his part. And further it was found, That in 35 H. 8. the said
Sir George Monox died seized in Fee, and that the said six Devisees
entred and injoyed the Tenements, but that none of them paid the
sums appointed to the Clerk who was to attend in the Chappel,
but had failed in that point: They further found, That the said
Roger Alford died Ed. 6. and that Edward Alford was his Heir
and entred into his part, but hath not performed the trust in this
point, That in 5 Eliz. the Heir of Sir George Monox entred, for
breach of the condition, and that Edward Alford entred and *ousted*
him, and that afterward the said Edward Alford purchased the parts
of the other Devisees, by Deeds indented and enrolled in the Hu-
stings, who in 11 Eliz. bargained and sold all their Estates and
Rights in the said Tenements, to the said Alford and his Heirs, up-
on trust that he should perform the Purposes and Declarations in
the Will of the said Sir George Monox appointed, and that the
said Alford was in possession, and that afterward, viz. 35 Eliz. he
being in possession, A fine *sur* Release with Proclamation was levied
unto him, and that he continued his possession, and died seized,

which

which Land descended to the Defendant his Son. They find further, that the summ of 26 s. 8 d. was never paid unto the said Clerk to this day, and that neither the said Heir of Sir George Monox, nor the Major of London & Communalty had any notice of this Will, nor of the conditions, nor of the non-payments, until within these four years last past: And that after notice, the Major and Commonalty entred, and Alford re-entred, whereupon the Action was brought: Et si super totam, &c. Judgment shall be given for the Plaintiff, was the question? And it was very well argued at the Barr for the Plaintiff, and by Serjeant Finch for the Defendant. Upon the argument three main questions were made. First, whether this be a condition or limitation appointed by the Will? And admitting it be a limitation, and that it may, after the first limitation, be good to the Heir of Sir George Monox, whether such limitation may be good to the Major and Commonalty, being but a possibility? Secondly, Admitting that they be limitations and good limitations of the Estate of the Devisees, this being broken in the first year, and so de anno in annum, Whether there be a good title of entry for the Heir of Sir George Monox, and after to the Major and Commonalty, for not performing of the trusts; and they not having entred, but suffering a fine with Proclamations, and five years to pass, Whether this be not a barr to their entry? Thirdly, Admitting there hath not been performance of the Will, but a breach of the trusts, Whether the want of notice shall aid them? Because the words of the Will are, If through oblivion or other cause, the trusts be not performed, then they shall ree-enter. And the Court resolved, That the fine with Proclamations, and the five years passed, hath absolutely barred the Plaintiffs Estate: And they conceived also, That it is a void limitation to the Major and Commonalty, being a possibility upon a possibility, Vid. Coke lib. 1. Rector de Cheddingtons Case, And that the finding they had not notice, was not material; for there is not any appointed to give notice, & they at their peril ought to take notice of breach of the Estate. But for these two last points, they were not so unanimously resolved; But for the second, they all absolutely held, that the fine with the Proclamation, and the non-claim and five years passed, hath absolutely barred them; Whereupon Judgment was given against the Plaintiffs.

Co. 4. 82 b. R. 729. Dier 33. a. Co. Lit. 18. a. R. 408. 2 Cr. 146. R. 654. 725.

Termino Paſchæ, anno decimo quarto *Caroli* Regis, in Banco Regis.

Freemans Caſe.

ONe Freeman was brought to the Barr by Habeas Corpus out of the Fleet, and the return was, That he was committed 14 Feb. 1639. by the Lords of the Privie Councel, for divers cauſes and miſdemeanors, until they gave order to the contrary, as appeared by their Warrant there produced. It was alſo returned, that he was to be deteined by another Warrant from the ſaid Lords, 26. April 1640. wherein is mentioned, that he, being warned by a Meſſenger in December to appear before the ſaid Lords, refuſed to come before them, and in contempt made a *reſcous* and cauſed thereby a great tumult in the Town, which being proved before the ſaid Lords, by the oath of two perſons therein named, they thereupon, the 14 Feb. 1639. committed him. And now by this Warrant appointed the Warden of the Fleet to retein him, until they gave further order, &c. Hereupon Bagſhaw for the priſoner moved, that he might be diſcharged, or at leaſt bayled. And as to the firſt return, the Court held, If there had not bèn a ſecond commitment returned, he ought to have been bayled: But for the ſecond, they gave time until Saturday, for the Kings Counſel to maintain the return, and to ſhew cauſe, why he ſhould not be bayled: and the Kings Counſel ſaid, they would proceed againſt him by Endictment or Information; and that there were divers preſidents, where ſuch Informations have bèn brought in this Court for miſdemeanors. 1. Ante 558. Poſt. 593. Ante 552.

Anonymus.

ONe J. S. upon an Habeas Corpus was brought to the Barr, and returned, that he was committed by order of the Exchequer, 9 Car. for not paying of a fine of 50 l. by the Eccleſiaſtical Commiſſioners impoſed upon him: And although it were not ſhewn wherefore the ſaid fine was impoſed; yet becauſe that commitment was by a Judicial Court, this Court would neither bayl nor diſcharge him. 2. Ant. 133.

Norton *verſus* Acklane. Hill. 15 Car. rot. 549.

3. COvenant upon an Indenture of Demiſe by the Plaintiff to the
1 Rol. 522. Defendant of an houſe for years: Wherein the Leſſee Covenants for him and his Aſſigns, to repair the houſe from time to time, and to leave it at the end of the term ſufficiently repaired: and for not repairing, aſſigns the breach. The Defendant pleaded, that he aſſigned (by indenture ſhewn in Court) all his Eſtate and intereſt in the Term to Joh. St. ſuch a day and year; who entred and paid his rent at ſuch a feaſt after, to the Plaintiff the Leſſor, who accepted thereof; & that there was not any default of reparations, before the aſſignment. Upon this Plea the Plaintiff demurrs: And Broom for the Plaintiff ſhewed, that the Action well lies againſt the Leſſee, notwithſtanding this acceptance of the Aſſignee to be his
Ante 188. Tenant, or againſt the aſſignee at his election, and he ſaid that it
2 Cr. 522. was adjudged ſo in this Court, Hillar. 16 Jac. betwixt Brett and
1 Rol. 522. Cumberland (the Record whereof is entred Hill. 14 Jac. rot. 1486.
2 Cr. 309. And Brampſton and my ſelf were of the ſame opinion (Jones and Berkeley being then abſent,) And becauſe we conceived the caſe to be clear and ſo adjudged in the caſe laſt cited, we gave Rule, That Judgment ſhould be given for the Plaintiff, unleſs, &c. And Jones and Berkeley being informed thereof at Serjeants-Inn, agreed, that the Action well lay.

Anonymus. Hill. 15 Car. rot. 1656.

4. A Writ of Diſtringas, Villatas circumadjacentes Villæ de *Dorling*, ad levandum Sepes & Foſſatas, &c. proſtratas per diverſas perſonas ignotas, & ad adquirendum, &c. Which Inquiſition being returned and the Malefactors unknown, they found damages, by vertue of the Statute of Weſtm. 2. cap. 46. And hereupon the Kings
Ant. 281. Atturney prayed a Diſtringas againſt the Inhabitants, And whether he ſhould have it without a Scire facias ſued to anſwer, and what Proceſs he ſhould have was much doubted? Wherefore the Court would adviſe thereof.

Reymond *verſus* Burbedg. Trin. 15 Car. rot. 1656

5. ERror upon a Judgment in the Common Bench in Debt upon
1 Rol. 416 206. an Obligation conditioned for performance of an award. Upon demurrer (becauſe it was conceived the arbitriment was void) Judgment was given for the Defendant, Quod querens nihil capiat per Breve. And now Godbold for the Plaintiff aſſigned, That it was Error; for the Action was there brought by an Atturney, by a Bill of privilege, and not by original Writ; ſo the Judgment ought to have been nihil capiat per Billam, & not nihil capiat

per

per Breve; & was held a manifeſt Error, unleſs it were the miſtake of the Clerk and amendable, But the Court doubted thereof, Becauſe it was in the Judgment, which is by the Court, and is not to be accounted the entry of the Clerk only, vide 14 Eliz. Dy. 315. Ant. 574. Error of a Judgment in Treſpaſs againſt a Biſhop; for omitting, Ideo capiatur pro fine and reſolved to lie well enough without it, for a Capias lieth not againſt him. But for this point the Court would adviſe.

John Biſhop of Salisbury *verſus* Hunt & others. Trin. 15 Car. rot. 543.

TReſpaſs, for carrying away two loads of Wheat being ſet out for Tythe, ſevered from the nine parts at Stapleham in the Pariſh of Damorham. The Defendant pleads, that Queen Eliz. was ſeized in Fee of the Rectory appropriate of Damorham and being ſo ſeized by her Patents dated 20 Junii anno 22. Regni ſui, granted and demiſed the Tythe of Corn and Hay growing in Damorham and Stapleham, to Anthony Aſhley for his life, remainder to Robert Aſhley for his life, that Anthony Aſhley was ſeized for life and dyed, and afterwards Robert Aſhley ſurviving was ſeized: And that the Defendant by his command, and as his ſervants, took the ſaid loads of Wheat, &c. The Plaintiff replies, that before the Grant to Anthony Aſhley and Robert Aſhley, Queen Eliz in the 15th. year of her raign, by her Letters Patents granted the ſaid Tythes to Thomas Stockman for 21 years; & that in the 17. year of her raign by her Letters Patents, reciting the ſaid Leaſe, ſhe granted the Reverſion of the ſaid Tythes to the Biſhop of Salisbury & his Succeſſors, and entitles himſelf as ſucceſſor, and that the Tythes were ſevered, &c. and the Defendants had taken them, &c. Upon this replication the Defendants demurred generally, & Maynard for the Defendants ſhewed the cauſe to be; for that the Defendants intitle themſelves by Grant from Q. Eliz. anno 22. Regni ſui, & the Plaintiff claiming by Q. Eliz. doth neither confeſs and avoid nor traverſe, &c. And being argued at the Barr, Berkeley and my ſelf held, that the Plaintiff needs not to confeſs and avoid, nor traverſe, when he claims by a former Grant from the ſaid Queen, viz. anno 17 Regni ſui, which preceeds the title alledged by the Defendants: And if it be not a good Grant, the Defendants, who claim by a latter Grant, ought to have traverſed the precedent grant to the Plaintiff, which is preſumed to be good until the contrary be ſhewn; and the Plaintiff needs not to anſwer to a puiſny Grant, alledged to be after his Grant; & cited the caſe Cok. lib. 6. fol. 24 Heliers Caſe, & 2 Ed. 6. Br. Confeſſ. et Avoid. 66. Dyer. 366. 10 Ed. 4. 6. But Brampſton & Jones doubted, becauſe the Queen might peradventure have a latter title & make a good Grant, this being argued in Hillary Term, was adjourned until this term: and now Brampſton ſaid, That he had conſidered of the books cited, & agreed that the Plaintiff claiming by a former Grant, needs not to make either a confeſſion 6. Ante 324. 2 Cr. 299.

confeſſion and avoydance, nor traverſe; whereupon Rule was given (Jones abſente) That Judgment ſhould be entred for the Plaintiff, unleſs, &c.

Plowden *verſus* Oldford. Mich. 15 Car. rot. 86.

7. Jones 454. 1 Rol. 480. ERror of a Judgment in the Common Bench. The caſe upon the Record was, that Parſon, Patron, and Ordinary, before the 13 Eliz. made a Leaſe for 99. years, there being a Grant of the next avoydance before this Leaſe: Afterwards the Parſon, who made this Leaſe, died; the Grantee of the next avoydance preſents another, who being admitted, inſtituted, and inducted, entred and avoided this Leaſe during his time, and afterward died; the Patron, who joyned in this Leaſe for years, preſents a new Incumbent, who was admitted, inſtituted, and inducted: And whether he ſhall hold it diſcharged of this Leaſe for years, as his predeceſſor did, was the queſtion? And adjudged that he ſhould; for the Leaſe is totally avoided by the entrance of the ſecond Incumbent, & not for his time only. And of this opinion were Jones and Berkeley (for Brampſton and my ſelf were in Chancery) and their reaſon was, Becauſe the Parſon hath the entire Fee, as a Parſon may have of a Rectory preſentative: And when he is in, and hath evicted the Leſſee, it is an abſolute eviction of the intire Term, without expectation of reviver, and it is not only an eviction for himſelf, but for all his Succeſſors, Wherefore they gave rule, That Judgment ſhould be affirmed. And this being reported to Sir Joh. Brampſton chief Juſtice of this Bench, to Sir Edw. Littleton chief Juſtice of the Common Bench, to Dampart chief Baron, and to my ſelf, We all agreed to that Judgment: And afterward the caſe being moved again by Godbold Serjeant, to have day till next Term, to ſpeak in arreſt of Judgment, the Court would not give any further day, but the Judgment was affirmed. Co. 7. 8. a. 1 Rol. 480. Hob. 7. Co. Lit. 46. a.

Torles Caſe.

8. TOrle, and four others of the Pariſh of St. Bartholmew, were brought to the Barr by Habeas Corpora, and by the return it appears, That they were committed to a Meſſenger, for contempt to the Eccleſiaſtical Commiſſioners, for not performing of their order, in paying the Pariſh Clerk his wages, rated by their order at 4 d. the quarter for every houſe in Great St. Bartholemews, which they refuſed to pay but according to their cuſtome as they were rated by their Church-wardens and Veſtry. And now Doctor Merrick and Doctor Eccleſton moved, That they ſhould be remanded; for they ſaid, this order was grounded upon the Kings Letters Patents wherein it is provided, that the Clerks ſhould gather and receive their wages as ſhould be ordered by the high Commiſſioners, and pretended that for any contempt, they might Ant. 114. 220. 4 Inſt. 327. 8.

might fine and imprison. But upon this return they were bayled until the first Tuesday next Term.

John Parkers Case.

JOhn Parker was brought to the bar by Habeas Corpus, and the cause of his Commitment appeared to be, by vertue of a Writ, de Excommunicato capiendo, grounded upon the Chancellor of Norwich his certificate into the Chancery, It was pleaded that this Excommunicato capiendo was void, and that the party was not lawfully imprisoned, because by the Statute of 5 Eliz. the Writ ought to have been brought into the Kings Bench, and to have been inrolled there and delivered in convenient time to the Sheriff. And all the Court resolved he was not duly imprisoned, and therefore he was discharged. 9. 2 Cr. 567.

The Case of Sir John Dryden ad sectam Domini Regis, cujus principium ante pag. 574.

WAs now in the end of this Term moved again, That the Writ of Right of advowson should abate by the death of one of the Tenants; although it be admitted that they were Joyntenants. Now because neither Walter Atturney, or any other, had argued for the King all this Term, all the Court reteined their former opinion, that the Writ should abate, and that Judgment should be entred accordingly, Vid. postea 585. 10.

Thomas Bensteds Case.

THomas Bensted, die Jovis post clausum Termini, was endicted and arraigned before special Commissioners of Oyer & Terminer in Southwark, wherein all the Justices and Barons were in Commission and present; at which time upon conference with all the Justices, it was resolved, First, that going to Lambeth House in warlike manner to surprise the Archbishop, who was a Privie Councellor, (it being with Drums and a multitude (as the Endictment was) to the number of 300 persons) was Treason. Secondly, that the sitting and inquiry and trial of the Prisoners, all upon one day, by virtue of the Commission of Oyer and Terminer, without any Commission of Gaol-delivery, was good enough, notwithstanding the Book of 2 H. 8. which was held to be no Law. Thirdly, It was resolved by ten of the said Justices seriatim, That the breaking of a Prison wherein Traytors be in durance, and causing them to escape, was Treason; although the parties did not know that there were any Traytors there, upon the Statute of 1 H. 6. 5. And so to break a Prison whereby Felons escape, is Felony, without knowing them to be imprisoned for such offence. 11. Jones 459. R. 48. 2 Inst. 568. Ante 448. Kewl. 159. 2 Inst. 589.

Termino

Termino Trinitatis, anno decimo ſexto *Caroli* Regis, in Banco Regis.

Memorandum, That in the vacation betwixt Eaſter and Trinity Term, by the nomination of Sir *John Finch* Knight, Lord Keeper of the Great Seal, and Sir *Edward Littleton* chief Juſtice of the Common Bench, theſe twelve were appointed to be Serjeants, *viz. John Stone*, *John Whitwick*, and *Henry Rolls* of the *Inner-Temp.* *William Littleton* (ſecond brother of the ſaid Sir *Edward Littleton*) ..... *Bryerwood*, and *Robert Hide* of the *Middle-Temple*, *Rich. Taylor*, *Ed. Atkins*, and *John Green* of *Lincolns Inn*, *Peter Pheſant*, *Fran. Bacon*, and *Sampſon Evers* (the Kings Atturney in the Marches of *Wales*, and now made one of the Kings Serjeants) of *Greys-Inn*, all of them then Benchers, and having been Readers of their reſpective Houſes, who had Writs delivered them, bearing *Teſte* 21. *Maii*, returnable in Chancery *Octabis Trinitatis*, which was *die Lunæ*: And they appeared in Chancery *die Jovis*, being the *quarto die poſt*, and were ſworn, and gave Rings, &c.

Leytons Caſe.

RIchard Leyton was endicted, for that he at S. in the County of Midd. had erected a Barn upon parcel of the High-way leading from ..... and concluding Ad grave & commune nocumentum omnium Leigeorum ac ſubditorum Domini Regis per viam prædictam euntium tranſeuntium equitantium, &c. And Grimſton moved, (the words contra pacem being omitted) that the Endictment might be quaſhed; for which cauſe Berkeley and my ſelf being only in Court, agreed that the Endictment was ill: And I held that it ought by the Law to be quaſhed. But Berkeley would not agree thereto, becauſe the uſual courſe is not to quaſh an Endictment for Nuſance in an High-way, without a certificate that the Nuſance was removed and avoided: And although there were a certificate by many of the Inhabitants, within the ſaid Will and places adjoyning, That the Barn was not erected upon the High-way, nor the High-way ſtraightned thereby: Yet Berkeley would not aſſent to have the Endictment quaſhed. But I conceived, Becauſe the certificate was that there never was any ſuch Nuſance erected: And the Endictment being agreed to be vitious, it ought to be quaſhed for the ſaid Error, when it is apparent, &c. For to traverſe and try it is a charge and to no purpoſe, becauſe the party in an Action upon the Caſe, cannot recover his damages and coſts, for falſly and malitiouſly endicting him, although he be acquitted; eſpecially here when the Endictment is totally vitious.

John

Abdy Alderman of Londons Caſe.

JOhn Abdy Alderman of London having an houſe at ..... in the County of Eſſex, where it was pretended, that Conſtables ſhould be elected out of the Inhabitants in every houſe, by preſentment every year in the Leet of Sir William Hicks, Lord of the ſaid Manor and Leet; the ſaid Alderman Abdy by the name of John Abdy Eſquire, was nominated in a Leet holden ſuch a day, to be Conſtable there, for the year following. And becauſe he refuſed, one John Duke being Steward there, impoſed a fine upon him and denied him his priviledge to be freed by reaſon of his being an Alderman; Whereupon this being ſuggeſted, it was moved, To have a Writ out of this Court, directed to the Lord of the ſaid Manor, or his Steward to diſcharge him, becauſe he being an Alderman of London, ought to be there reſident the greateſt part of the year, and if abſent, is finable. And all the Court held. That he ought to be diſcharged by his priviledge; as Atturnys attending in Courts are diſcharged of ſuch Offices of Conſtables and other Offices in the Pariſh. And although it was ſaid, he might execute it by Deputy, and his perſonal attendance is not requiſite by the cuſtome of the ſaid Manor. Yet non allocatur; whereupon it was awarded, That a Writ ſhould be directed to the Lord of the ſaid Manor to diſcharge him. 3. Jones 462. R. 100. 497. Ante 389. Moor 845.

Sir John Dryden, Margaret Gybbs, and Will. Kingſmill Plaintiffs, *verſus* Thom. Yates, and the Biſhop of Peterborow.
Mich. 10 Car. rot. 1433. Ante pag. 583.

QUare impedit, ad preſentandum ad Eccleſiam de Middleton-Cheney: Wherein the ſaid Plaintiffs count, That William Wilcks was ſeized in Fee of the Advowſon of the ſaid Church as in groſs, and the Church being void, preſented thereunto one Edward Broome, who was admitted & inſtituted in the time of Q. Eliz. and being ſo ſeized died, which deſcended to Robert Wilks his Son and Heir: And he being ſo ſeized, died ſeized without iſſue, which deſcended to Anne, Frances, and Margaret, as to his Siſters and coheirs whereby they were ſeized in Fee. That Frances took to husband Sir Eraſmus Dryden Baronet, who died ſeized of that part of the Advowſon pro indiviſo with the other two Siſters, which deſcended to Sir John Dryden their Son (and ſo conveys the deſcents to the other Siſters) and that by the death of the ſaid Edward Broome, the laſt incumbent, it belongs unto them to preſent: And the Defendants diſturbed them. The Biſhop pleaded, that he claims nothing but as Ordinary. The Defendant Yates pleaded That he is Parſon Impariſonee of the preſentment of the King: And that before the ſaid William Wilks had any thing to do in the ſaid Advowſon, Queen Eliz was ſeized in Fee of the ſaid Advowſon jure Coronæ, as of an Advowſon in groſs: And after the death 4.

of the ſaid Incumbent, preſented James Ellis, who was admitted, inſtituted, and inducted: That afterwards Queen Eliz. died, and the ſaid Advowſon deſcended to King James, and from him to the King which now is, who preſented the Defendant. The Plaintiff replies, as in his Declaration, That the Church being void by the death of Broom, they preſented, &c. and traverſe, that James Ellis was admitted; inſtituted, and inducted, upon the preſentation of Queen Eliz. And ſo joyned iſſue, and found by Verdict at the Common Bench, that the ſaid James Ellis was not admitted, inſtituted, and inducted upon the preſentation of Queen Eliz. as the Defendant hath alledged: And that the ſaid Church the laſt of September 1633. vacavit per motem of Will. W... the laſt Incumbent there, Et valet 200 l. per annum ultra Repriſas: And that the ſaid Church is full of Thom. Yates ex preſentatione Regis nunc: ideo conſideratum eſt quod querentes recuperent preſentationem ſuam verſus Defendentem: & habeant Breve to the Biſhop of Peterborough: Quod non obſtante reclamatione of the ſaid Thom. Yates, ac licet the ſaid Thom. Yates was admitted, inſtituted, and inducted into that Church, that he ſhould amove the ſaid Thom. Yates & idoneam perſonam ad preſentationem of the Plaintiffs admittat ſine dilatione: & conſideratum eſt, That the Plaintiffs recuperent verſus the ſaid Thom. Yates damna ſua pro valore Eccleſiæ pro dimidio anni ſecundùm formam Statuti, which amounted to 100 l. Et prædictus Thom. Yates in miſericordia. And upon this Judgment, Yates brings a Writ of Error, and aſſignes for Error, Firſt, That the Plaintiffs in their Replication, traverſe the admiſſion, inſtitution, and induction of James Ellis of the preſentation of Queen Eliz. And hereupon iſſue joyned and tryed, where they ought to have traverſed the ſeiſin of Queen Eliz. & not the admiſſion, &c. The ſecond Error, Becauſe Judgment was given for the Plaintiff, where it ought to have been for the Defendant. To theſe the Defendants pleaded, in nullo eſt erratum. And after divers arguments at the Barr, it was adjudged, That the traverſe was good and well taken, and that the ſeiſin in the Queen ought not to have been traverſed; whereupon Rule was given that Judgment ſhould be affirmed. Vid. poſtea. 589.

Ante 105. a. 174.

Thorn *verſus* Shering. Hill. 15 Car. rot. 588.

5. Yelv. 147.

TReſpaſs de Clauſo fracto. The Defendant juſtifies his entry by the command of J. S. The Plaintiff replies and ſhews, that J. S. was ſeized in Fee and let unto him at will, and traverſeth the command of J. S. The Defendant maintains, That J. S. commanded him to enter, and that he entred by his command, and traverſeth the Leaſe at Will. And hereupon it being demurred, 'twas adjudged for the Plaintiff, That the command was traverſable: And that the Defendants rejoynder to make a traverſe upon a traverſe, as this caſe is, was not good, Wherefore Judgment was given for the Plaintiff, Paſc. 38 Eliz. in Parkers Caſe, adjudged that the command is traverſable.

2 Cr. 463. Co. 6 24. a.

Ante 105.

Termino

Termino Michaelis, anno decimo sexto *Caroli* Regis, in Banco Regis.

George Meade *versus* Sir John Lenthall.

1. Jones cas. 116. 2 Bul. 58. 2 Ro. 189.

ACtion upon the Case for disturbing him to execute the Office of Marshal of the Kings Bench, granted upon him by Patent for years. Upon Not guilty pleaded, and special Verdict found, The sole question was, Whether a Patent of this Office granted for years (which was the Plaintiffs title) be good or not? And it was argued by Jenkins and Maynard for the Plaintiff, and by Heath and Rolls for the Defendant. And after advisement of the Court until this Term; it was agreed nullo contradicente, That Judgment should be given for the Defendant. And Brampston chief Justice delivered all their opinions to be so principally for the reasons given in the case of Sir George Reignalds, H.11. 9. Jac. Cok. lib. 9: fol. 97. For this being an Office of great trust, and attendance continually in Court: Great inconveniences would ensue if such Offices might be granted for years, which thereby might come in suspence upon probate of a Will, until administration were committed thereof: And it might fall, or be given to persons insufficient, of whom the Court could not conveniently admit: And whereas it was objected, That it may be granted in Fee or in Tayl, &c. and so descend to an Infant, &c. and therefore for years. It was answered, That in such case, the Court hath used to put in another fit person for the time: And whereas it was objected, That Offices of Sheriffs were granted for years, until restrained by a Statute of 14 Ed. 3. It was answered, That those Grants were de facto, but it never was debated, what inconveniencie might ensue by the granting of such Offices in that manner, which concern the Justice of the Kingdom and which require continual attendance.

Lodge *versus* Hollowell. Trin. 15 Car. placita Reg.

2.

INformation for the King, the City of London, and himself; For that the Defendant being a Currier bought two Hides of tanned Leather, each of them of the value of 16 s. of persons unknown, & sold them unwrought and not converted into made wares, to one James Mercer a Shoemaker in London, contra formam Statuti; whereupon he demands the third part of the said value for the King, the third part for the City of London, and the third part for himself. The Defendant pleaded Not guilty, and the Jury find an especial Verdict, That the Defendant being a Citizen and Inhabitant of London, bought the said two Hides of persons unknown, and after

curried them with Oyle and Tallow and other things neceſſary, and after ſhaved & dyed them; and ſo being wrought, ſold them to the ſaid James Mercer a Shoemaker in London: And whether that be a buying and ſelling (not being otherwiſe, nor converted into made Wares) againſt the form of the Statute? they prayed the diſcretion, &c. and found them to be of the ſame value as in the Information, &c. And it was argued at the Barr by Rolls Serjeant, and Maynard for the Plaintiff, and by Maller Serjeant, and Holborn for the Defendant: And this Term by all the Court ſeriatim, Becauſe it concerned a multitude of Curriers: And they all reſolved, that it was an offence againſt the Statute of 1 Jac. cap. 22. and the value forfeited by the Statute; for this ſelling by a Currier not being cut out and made into Wares, is againſt the letter and meaning of the Statute of 5 & 6 Ed. 6. cap. 15. 27 Eliz. cap. 16. & 1 Jac. cap. 22. All which were well weighed and conſidered, and this Information is grounded upon the Statute of 1 Jac. for it demands the third part, which none of the other Statutes gives. And the Statute of 5 Ed. 6. cap. 15. is perpetual, which expreſſly forbids all perſons to Regrate for the buying & ſelling by whole-ſale, and all perſons who were not Artificers, to convert Leather into made Wares: and this is a perpetual Statute, not repeaſed by any, unleſs by the Stat. of 1 Mariæ ſect. 2. which repeals 5 Ed. 6. as made and procured by the Shoemakers for their private gains: and the Curriers were reſtrained by the ſaid Statute, and therefore the Statute of 1 Mariæ repealed the Statute of 5 Ed. 6. and allowed Curriers to buy and ſell Leather to Artificers who work it into made Wares: But this Statute of 1 Mariæ was repealed by the Statute of 1 Eliz. cap. 8. which repeals eight ſeveral Statutes there mentioned concerning Leather, and expreſſly revives the Statute of 5 Ed. 6. (becauſe by the repeal thereof Leather was dearer, Boots and Shoes and other Wares, ſold at exceſſive prices to the undoing of many,) but only as to one clauſe therein, viz. That Shoemakers may ſell Boots and Shoes and other Wares at Calis (which then in the time of Ed. 6. was Engliſh.) But now becauſe that part of the ſaid Statute was repealed, it ſhews that all other parts of the ſaid Statute are continued, & eſpecially the Statute of 27 Eliz. cap. 16. is expreſſly in the point, That Curriers by name ſhall not buy and ſell tanned Leather, unleſs it be wrought & cut out, & converted into made Wares now uſed, or hereafter into made Wares. Which ſhew that Currying only is not accounted a converting into made Wares. And Berkeley cited Bracton who deſcribes Ware to be made by cutting out & ſowing, & converting them into another ſpecies, & the Statute of 1 Jac. repeals the Stat. of 1 Eliz. for it hath the ſame words no perſon or perſons, &c. tanned Leather, &c. they who convert it into made Wares, &c. And although it was objected by Holborn, that this Statute was never in ure againſt Curriers, but that currying and dreſſing hath been accounted made Wares by their Trades: It was anſwered, that thoſe Statutes being

being in force and not repealed, the Currier was bound thereby and punishable, as it is held in the like case 4 Ed. 4. 1. & 11 H. 4. 38 wherefore they all held, that a Currier may not sell nor buy by whole-sale. But peradventure they may buy and sell in any other manner, not prohibited by any Statute as to Coachmakers, Joyners and others for the making of Chaires and Stooles who used such Leather. And great inconvenience would ensue, if they should be permitted to buy and sell whole, not cut out, and made into some kind of wares; wherefore it was adjudged for the Plaintiff.

Orme *versus* Pemberton.

3. THe Plaintiff prayed to have a Writ granted to revoke Pembertons election, who was chosen by the Parson of St. Katherine in Coleman-street, to be Clerk of the said Parish, whereas the Parishioners at their Vestry according to the custome of the Parish had elected the said Orme: And that the Court would direct them to admit the said Orme. And hereof the Court would advise, and appointed that Presidents should be searched what hath been done in such cases, Trin. 21 Jac. A Prohibition was awarded against a Parson and Clerk, who sued in the Spiritual Court to be admitted, as elected by the Parson, and the other elected in the Vestry. 2 Ro. 234. Ante 552. 2 Cr. 670.

Yates *versus* Sir John Dryden and others. Mich. 10 Car. rot. 1473. in Com. B. Ante pag. 585.

4. ERror of a Judgment in the Common Bench, in a Quare Impedit: Where the Judgment being upon Verdict, Yates brings a Writ of Error, & hanging the Writ of Error, the King brings a Writ of Right of Advowson, And by motion to the Court, the proceedings in the Writ of Error were stayed, until the trial in the writ of Right, and when the Mise was joyned upon the Right, who had best right, and thereupon special Verdict given, after Verdict one of the Tenants died: And the question was, whether thereby the Writ should abate? and after long debating, it was resolved, and adjudged, that the Writ should abate in all: And afterwards the Court proceeded to the examination of the Errors. And the Court upon debate adjudged, that it was not erronious, and gave Rue that Judgment should be affirmed, unless cause were shewn the first Monday of this Term: And then no cause being shewn, Rule was absolutely given, that Judgment should be affirmed. And in the interim, Yates exhibited a Bill in the Exchequer-Chamb. against the Defendants in the Writ of Error, and served them, and upon their answer obteined an order to stay that Suit, that they should not draw up the said Judgment, and served all the parties and their Counsel therewith: And afterward the said Yates served the Prothonotaries of this Court with this injunction, That they should not enter up the Judgment which the Court had commanded Ante 574.

ed to be entred up. And hereupon the Attorney General exhibited a Plea, which was, that Margaret Gybbs held that Advowson in Coparcenery, with the other two Plaintiffs by Knights-Service, in capite & died seized, which descended to William Gibbs her Son and Heir, of full age, viz. of 27 years: And for want of his suing out Livery, it belonged to the King to present, And demanded Judgment si Executio. And all the Court held it to be no Plea, especially there being no Office produced finding the same: Although the Attorney & Solicitor General much insisted, that a title appearing for the King, the Court ex Officio ought to award for the King, and relyed upon 21 Ed. 3. 30. 12 H. 7. 12. That the King should have the Right of any Coparcener, and N.B. 38. E. that where title appears for the King, the Court shall award a Writ to the Bishop for the King: Yet all the Court held, that here, as it is alledged, there is not any colour of Plea, but it ought to be rejected; for it is but matter in fact, especially in this Writ of Error, The Judgment being given in the Common Bench, and execution for damages given in the case, and increased here by the Statute of 3 H. 7. which is not to be stopped, or the parties to be delayed by such bare surmises, not being grounded upon any matter of Record. And it was afterwards argued at the Barr by Holborn for the Defendants in the Writ of Error, and prayed that Judgment might be affirmed; For there is no color for this Plea, nor any matter confessed of Record by pleading betwixt the parties, that the King hath title to present, For then, true it is, the Court ought to direct a Writ to the Bishop for the King ex officio, as it is in 11 Hen. 4. by Fitzh. 38. 12 H. 12. 9 H. 7. 9. 19 Hen. 7. 12. per Fineux. But when it doth not appear upon the same Record, there is not in such case any book which maintains that a writ should be sent to the Bishop for the King. And whereas it was here objected that the Verdict in the writ of right of Advowson (being a Writ of the highest nature) should control the Verdict in the Quare impedit: For there the Verdict is, that the said James Ellis was not admitted, instituted and inducted ad Ecclesiam prædictam, ad presentationem dictæ nuper Reginæ Elizab. modo & forma prout the Defendant hath alledged, and the special Verdict in the writ of Right finds, That the said James Ellis was admitted, instituted and inducted ad Ecclesiam prædictam ex presentatione dictæ nuper Elizab. Reginæ, which being a more high action destroys the former Verdict in the Quare impedit; And therefore the Judgment and Execution is thereby to be avoyded, as Banks Attorney general, & Herbet Solicitor general affirmed. Holbourn answered thereto, Admitting there had bin two contrary Verdicts, yet the first Verdict in the Quare Impedit, & Judgment thereupon, ought not to be avoided unless by Error or attaint: And whereas it was alledged, that where the said Verdict in the Writ of Right of Advowson found good title for the King, therefore the Court ex Officio ought to stay the awarding of entring Judgment upon the Quare Impedit, & ought to award a Writ to the Bishop for the King, He answered

Hob. 127. Moor. 872.

2 Cr. 627.

answered admitting there had been a good and absolute title found therein for the King, yet being a collateral Record, the Court should have no regard thereto, but ought to proceed in the Judgment to the reversal or affirmance thereof, in the Common Bench, that being their Commission, and no other: And he said, as this case now is, there being no general but an especial Verdict found; so as non constat what it is until Judgment shall be given in the Writ of Error, That the said Judgment cannot now be given, and therefore it cannot avoid the first Judgment in the Quare impedit, because the writ is abated by the death of one of the parties. And of this opinion was Berkeley and my self; for we have nothing to do but to reverse or affirm the Judgment, especially as this case is, where Judgment is given and damages and costs in the Quare impedit, against the Defendants there, and no colour to stay Execution thereof: And where damages are increased by this Court, the said Judgment being affirmed by the Statute of 3 H. 7. because the Writ of Error was in delay of Execution: And this Plea being matter of fact only, & demanding whether there ought to be Execution, there being no apparent Error assigned to reverse the Judgment, it cannot be good: And I insisted upon Hollands Case Mich. 40 & 41 Eliz. where it was agreed, That a Writ of Error is but a Commission to examine Errors, and there much doubted, what things might be assigned for Error, & therefore was of opinion that Judgment being entred, and damages and costs signed, it ought to be affirmed: But because the Atturney and Solicitor general were earnest to argue for the King. The Court gave them liberty to argue if they would, the Solicitor upon Monday 16. November, and the Atturney upon the Monday following: And the Atturny said, That he for the King was to argue last, and that none should argue after him. But I doubted thereof: Afterwards at the day appointed, the Atturny General argued very confidently, That no Writ ought to be awarded for the Plaintiffs to the Bishop in the Writ of Quare impedit. But that the Court, ex Officio ought to award a writ to the Bishop for the King: First, Because the Verdict in the Right of advowson (although it be an especial Verdict) finds expressly contrary to the Verdict in the Quare impedit: And this being an Action of an higher nature ought to be believed; For the Verdict in the Quare impedit finds, That J. Ellis was not admitted, and instituted, upon the presentation of Queen Eliz. And the Verdict in the Right of Advowson finds, That Queen Eliz. anno .... non habens jus presentandi presented the said J. Ellis who was admitted and instituted, to the said presentment of the Queen, which is expressly contrary to the Verdict in the Quare impedit, and destroys the Plaintiffs title; For the Queen had gained right against all, but him who had the true and very right: And the Verdict quod ad manus nostras, &c. is better than the other who hath no right: And the cases in 11 H. 4. 71. and other Books before cited were vouched again, That where title appears for the King, the Record being in this Court although the writs is abated by death; yet Ante 518.

yet there is a sufficient Record to entitle the King, whereof the Court ought to take notice, & be put many cases where by reason of Outlawry, or Felony the Court shall award the parties to be in execution. Secondly, he said, Although the grand Jury found that the Q. had minus jus habendi præsentationem; yet for as much as the Q. presented, she hath gained the possession, the admission, and institution of her Clerk and hath majus jus than he who hath not any title; and it appears not that the Plaintiffs have any title; wherefore he prayed that a Writ might be awarded for the King. But afterwards all the Court, seriatim, delivered their opinion, That the Plea pleaded is meerly void, being upon a surmise and without any Record shewn, as 4 H.7.5. Secondly, That the Verdict in the Writ of Right, being but a special Verdict, it doth not appear (if the Writ had not abated by death,) whether Judgment should have been for the King, or for the Defendants: And as I conceived clearly, Judgment ought to have been given for the Defendants; for the Verdict being that Q. Viz. non habens jus presentandi, yet presented to the Advowson, as in suo pleno jure as the presentation mentions, it is a void presentment; For the Q. was deceived in her presentment, which made it meerly void, as to the Q. who can do no wrong: And the usurpation is only in the incumbent, procured himself to be instituted, And he is the wrong doer, & against him only the Quare impedit is alwaies brought, & no possession, or rather no right is gained unto the Q. by such presentments by usurpation. But the other Justices doubted of this point: But they all resolved, That there ought to be a clear title & right appear for the King, & confessed by the parties in pleading, or otherwise fully apparent; for if not, the Court ought not to award a Writ, ex Officio, for the King: And as this case is there is not any clear title appears; For by death, the Writ of the Right of Advowson abated, & the Verdict of no force, & that there is no such contrariety, appears by the Verdict; for the second Verdict, if it had been in force, is no concluding Record, but only an evidence, which may well be contradicted. But it was resolved by them all, Although the Verdict had been in force, & had been to the contrary, yet being here by Writ of Error, which is only to affirm or reverse the Judgment given in the Common Bench, they all agreed to affirm the Judgment, and that there was not any Error therein: And in the Judgment of the Common Bench, there being a Writ awarded to the Bishop to remove the said Yates, that Writ ought to be awarded; And neither Yates nor any other, who hath pretence of title after the Judgment, or pendant the same, can hinder, but that the Judgment and execution ought to pass: And for the damages which were given in the Common Bench, and for the increase given in this Court, for the delay of execution (where 700 l. damages and costs are given for delay of execution, by the Stat. 3 H. 7.) They were well given, and due to the Plaintiffs who survived: And the death of one of the Plaintiffs doth not alter the case; Whereupon Judgment was affirmed and Writ awarded to the Bishop.

Co. 6 29. b.
Ante 99. 100.

Hob. 127.
2 Cr. 216.

Co 7. 26. b.

Richard

Richard Lees Case.

THe same day being Saturday, Richard Lee and seven others were brought upon an Habeas Corpus from Colchester. And it was returned, That they were committed there to Gaol being Anabaptists, using Conventicles, and absenting themselves from all parochial Churches, and baptizing and preaching, being all mechanical persons, viz. Taylors, Weavers, and such like: And it being proved by their own confessions, That one of their company of the age of 60. years, utterly disallowed of the Administration of the Sacraments, by the Ministers of our Church; whereupon an Endictment being found at the Sessions of the Peace holden at Chelmford for the County of Essex, for their absence from Church for a month, and resorting to Conventicles, against the Stat. of 35 Eliz. cap. 1. made against such persons, they being severally arraigned, thereupon pleaded Not guilty modo et forma; which being returned, a trial was appointed to be at the Bar upon Tuesday 24. November following: And the Statute was read unto them, because they pretended there was not any such Statute made against them, or that they knew of any such Statute, but only against Recusants; And the Court advised them to consider thereof, and timely to prevent the penalty which would ensue upon conviction; In the mean time they were appointed to be bailed, and to appear at the said day of trial, and in the interim to be of good behaviour. 5.

Brices Case.

BRice being committed by the Earl of Denby, brought his Habeas Corpus; And it being returned, that he was committed to the Goal of Oxon by the said Earl, (to remain there without bail or mainprise until he were delivered by the Justices in Eyre, It was ordered he should be bailed for 12 days, and that in the interim, they should amend the return; for the return being general and no special cause shewn, It was held to be absolutely void: And if the return were not amended, and good cause shewn at the day, It was ordered that he should be absolutely dismissed. 6. Ante 133. 507. 579.

Derby *versus* Hemming. Hil. 15 Car. rot.

ERror of a Judgment in the Common Bench in Debt upon an Obligation of 100 l. conditioned for the payment of 51 l. 6 s. 8 d. The Defendant pleaded, That he paid the foresaid 21 l. 6 s. 8 d. at the day (so mistook 21 l. for 51 l.) The Plaintiff replyes, That he did not pay the said 51 l. 6 s. 8 d. at the day in the condition, prout the Defendant hath pleaded, Et hoc petit quod, &c. & Defendens similiter. And upon this Verdict and Judgment for the Plaintiff, it was now assigned for Error; for that the Defendant pleads payment of 21 l. 6 s. 8 d. And the Plaintiff saith, non solvit the said 51 l. 6 s. 8 d. Et hoc, &c. so there is not any issue. And the Court doubted herein, 7. 2 Cr. 586. 2 Cr. 14.

herein, If there might be a Repleader. But becauſe it was adjudged in the Common Bench, no iſſue being joyned and damages and coſts given, it was held, there might not be Repleader. And it was reverſed.

Pelham *verſus* Hemming. Hill. 15 Car. rot. 999.

8. ERror of a Judgment in the Common Bench, in Debt upon an Obligation of 100 l. conditioned, That if Henry Hemming or Robert Hemming the Defendant, paid 51 l. 6 s. 8 d. to Sir Robert Napper ſuch a day, then it ſhould be void. The Defendant pleads, ſolvit ad diem, and found againſt him, and Judgment for the Plaintiff, quod recuperet debitum & damn', &c. againſt the ſaid Robert, & prædictus *Henricus* in miſericordia where it ſhould have been Robertus; for Henry was no party to the Record. And Maynard for the Plaintiff aſſigned this ore tenus for Error. And all the Court held, That this Entry is but miſpriſion of the Clark; wherefore it was ruled, that it ſhould be amended and the Judgment affirmed.

Ante 574. 2 Cr. 633.

Watkinſon and Joan his Wife *verſus* Turnor.

9. ERror of a Judgment in the Common Bench in Battery, againſt the *Baron* and *Feme*, where the Defendant Watkinſon pleaded generally Not guilty, and the *Baron* and *Feme*, quoad the wounding, pleaded Non culp. and quoad the Battery, the *Feme* pleaded Juſtification, and concludes with an Averment, Et hoc parata eſt verificare, where it ought to have been parati ſunt verificare. And this being aſſigned for Error, ore tenus, the Court much doubted whether it were good; For the *Baron* ought to have joyned with the Wife; wherefore they all would adviſe and ſee the preſidents in the Common Bench, in this point.

Ante 573. 2 Cr. 239. Ante 417.

Tregoſe *verſus* Wennel. Mich. 15 Car. rot. 226.

10. ERror of a Judgment in the Common Bench in Replevin, brought in the Hundred Court by pleint, and removed into the Common Bench by Recordare facias loquelam. The Error was aſſigned, becauſe it doth not appear, That Pledges were returned upon the pleint; and it was much inſiſted upon at the Bar, That this was Error, and relyed upon Huſſeys Caſe, Co. 9. 71. And all the Court agreed according to the ſaid Caſe; That if upon the original Writ Pledges be not returned (becauſe the Writ commands, That if Pledges be found, That then, &c. and it is to the Kings diſadvantage if Pledges be not found, as the loſs of his Fine) it was Error; but whether it be ſo in this Caſe was much doubted, becauſe the Sheriff may make Replevin without Pledges finding: And here the Error is of the Judgment in the Common Bench, and it is no Error in them: And peradventure Pledges were found and not returned, and it is at the Sheriffs peril if he doth not take Pledges, according to the Statute of Weſtm. 2. cap. 2.

Jones 439. 2 Cr. 414. Ante 446.

Memorandum

Memorandum, That upon the sixth of November this Term the Lord Keeper of the Great Seal, the Lord Treasurer, the Lord Privy Seal, Earl of *Arundel* Earl Marshal, the Earl of *Pembroke* Lord Chamberlain, the Lord *Cottington* Chancellor of the Exchequer, and all the Justices of both Benches, and Barons of the Exchequer, were assembled in the Exchequer Chamber to nominate three persons, of every County throughout *England*, to be presented to the King that he might prick one of them to be Sheriff of every County, which is usually done according to the Statute, upon the third of November being *Crastino animarum*. But because it was the first day of the Parliament, and the Lords were to attend upon the King, it was resolved, by the advise and resolution of the major part of the Justices, with whom conference was had in this cause, that it might be well put off to another day: And the Lord Keeper, notwithstanding the Statute, deferred it until this day. 11. Ante 13.

Sloper *versus* Child.

Error. The Error assigned was, That in the Writ of Venire facias awarded to the Sheriff of Somersetshire, the word Vicecomiti was omitted; yet the Sheriff of Somersetshire returned the Panel, and his name was indorsed. And after Habeas Corpora Juratorum, the Jury appearing, the Verdict and Judgment was for the Plaintiff, and this Error being assigned, it was held a clear Error: But because upon the Roll, the Writ was awarded Vicecom. Somers. and the omittance of the Sheriff is the fault of the Clerk; therefore all the Justices agreed, that it ought to be amended, and that the Judgment should be affirmed, unless, &c. 12. 1 Ro. 205. Ysham. 64. Ante 90. Hob. 68.

Sir Henry Williams Case.

SIR Henry Williams prayed a Prohibition to the Council of the Marches of Wales, because he was sued there for a Legacy above the value of 50 l. viz 60 l. and it was answered at the Bar, That their instructions were to hold plea of Legacies of any sum; but the Court doubted thereof; whether such instructions should be good to warrant their proceedings, because Causes testamentary and Legacies are suable in the Spiritual Court, and not elsewhere, notwithstanding their instruction: For they cannot warrant that which is not according to Law: And the Statute of 34 Hen. 8. warrants that Court. 13. Ante 318. 558. 531. R. 528.

Calmadies Case.

CAlmady prayed a Prohibition to the Court of Requests, for that in an Action of *Trover* for divers goods, after Verdict and Judgment in this Court, and affirmed in a Writ of Error, the Defendant surmised matter of equity, and that he was surprised in the Trial and had not his Witnesses there, having had two Verdicts before against this Trial. The question being upon sale by the 14.

Commiſſioners upon the Statute of Bankrupts: Whereupon a
3 Inſt 123. 2 Cr. 335. Prohibition was granted, and the Court reſolved, that ſo they would always do when ever any exhibited Bills were after Verdict and Judgment. Trin. 14 Eliz. rot. 1157. Flood verſus Stepney in the
3 Cr. 647. 4 Inſt. 97. Common Bench, where dureſs was pleaded unto a Bond; and afterwards an Attachment iſſued out of the Court of Requeſts againſt the Defendant, and it was held to be a good Plea, and there reſolved, That the Court of Requeſts cannot grant an Attachment of contempt: And in 37 Eliz. it was agreed per totam Curiam to be againſt Law, That the Court of Requeſts ſhould commit any: And in 40 Eliz. in this Court, Auſten verſus Breerton, in an Action and Judgment for the Plaintiff, the Defendant ſued in the Court of Requeſts to be relieved. This Court upon examination did bail the party, and Sir Thomas Gawdy was convented before the Queen for it; yet notwithſtanding it was held good enough, and Breerton was inforced to ſatisfie the ſaid Judgment.

Anonymus.

15. PRohibition was prayed, For that one J. S. (who was a Curate and Sequeſtrator of the Rectory of D. in London, by reaſon that Mr. Walker, for contumacy and other cauſes, was ſuſpended from exerciſing his function there) ſued four of the Pariſhioners in the Spiritual Court for Tythes of their houſes, and not before the Major, according to the Decree and the Statute of 37 Hen. 8. For they ought clearly to ſue before the Major of London, and not in the Eccleſiaſtical Court; And therefore divers Prohibitions have been granted; but whether in this caſe it was grantable, the ſaid J. S. being neither Parſon nor Vicar, was the doubt. And it was moved at the Bar, That for houſes, tythes ought not to be paid, unleſs there be a ſpecial Cuſtome, as in Cok. lib. 11. fol. 16. Doctor Grants Caſe, is clearly reſolved; and the Statute is introductive of a new Law, and thereby is appointed how it ſhall be ruled, and before what Judges, and what remedy ſhall be for the party grieved, unleſs their order be obeyed; and then he may not ſue in another place, nor before other Judges then the ſaid Statute appoints: And if Prohibition ſhould not be admitted for ſuing, it ſhould be a defrauding of the Statute, and would make it of none effect; wherefore the Court doubted, and would further adviſe, and gave day to hear counſel on both ſides.

Sir Matthew Mints Caſe.

16. UPon the 14. of November 1640. Sir Matthew Mints alias Ments, Knight of the Bath (who was convicted of Manſlaughter of one Weeks, who was his Servant, by beating or correcting of him, whereby he was ſo bruiſed, that he inſtantly died) and had his Clergy; and his burning in the hand, was reſpited:

spited: And now he pleaded his Pardon, whereby the burning in the hand for the Manslaughter, and all other Felonies committed by him, & alia malefacta, before the eighth of July last, were pardoned; And there was an especial clause, That he should not find Sureties for his good behaviour; and the Pardon bore date 31 Octob. last: And although there were divers misdemeanors committed by him after the said eighth day of July, for which he deserved to be bound to the good behaviour; Yet he had his Pardon allowed, and was discharged from finding Sureties, &c.

Aspye *versus* . . . . .

PRohibition was prayed to be awarded to the Councel of the Marches of Wales, where it was by Bill suggested, That a Copyholder in fee surrendred into the hands of such a Tenant such a Tenement, held of the said Manor by the verge, to the use of the Plaintiff; And that Pembridge the Steward of the Manor refused to admit him, and there prayed that he might be compelled to admit him, whereunto the Defendant pleaded that the custome of the Manor is to surrender into the hands of two Tenants, and that the said Surrender ought to be done by the verge: And this Surrender was only by a Knife, sitting at the Table, and into the hands of one Tenant only; And that he who made this Surrender was dead; and his Heir alledging that this Surrender was void, desired to be admitted, and was admitted: And that notwithstanding this answer, they proceed to try the Custome, which is triable only at the Common Law, whereupon a Prohibition was granted. 17.

Sherman *versus* Lylly. Hill. 15 Car. rot. 1198.

DEbt upon an Obligation of 200 l. conditioned, That whereas Lylly had married such a woman, being a widow, If the Defendant should permit his said wife to make a Will of her husbands goods, to the value of 100 l. to be paid within one year after her decease, that then, &c. The Defendant pleaded, That he permitted his said wife to make a will; And thereupon the Plaintiff demurred, and Rolls Serjeant said, That he ought to have pleaded, That he paid accordingly; for otherwise he doth not answer to the Condition, but only to one part thereof. And of that opinion was all the Court; For To be paid is all one with And to pay, otherwise it is an idle thing to permit her to make a Will, if he doth not pay; And therefore they all held, That the Plea was ill; wherefore it was adjudged for the Plaintiff. 18. 2 Ro. 247. 8. Ante 220.

Burwell *versus* Harwell. Hill. 15 Car. rot. 197.

REplevin. The question upon demurrer was, First, Whether the Grantee of a Rent-charge, by the Conusor of a Statute, after 19. Jones 456.

after the Statute acknowledged, and after the time of the extent of the Statute, averring that the Debt, Damages, and Costs are satisfied, may distrain for the rent and arrearages without suing a Scire facias? And after argument at the Bar on both sides, Berkeley Justice delivered his opinion, That the distress was lawful, without a Scire facias; for he did not meddle with the possession, but distrained for his rent: And he put a difference where a man makes a gift in tail, reserving a Rent; and where a Donor grants a Rent out of a Reversion, in the one case the Rent may be docked and barred by recovery against Tenant in tail; but in the other case it cannot be destroyed by recovery, but the Rent shall remain, at least as a Rent-seek, &c. And Brampston said, peradventure he might enter and distrain: for where a man hath *Profits a prender*, as Common for twenty Beasts, or twenty loads of *Estover* every year, if he might not have them until Scire facias, he should be at a great mischief. And I was of the same opinion, That he might distrain, if he at his peril will take notice, that the Extent is determined, and the Debt, Damages and Costs levied: And he cannot have a Scire facias because he hath no title by Record whereupon to ground a Scire facias. The second Question upon the demurrer was, Whether one who claims by the Conusor by Fine or other Record, may maintain a distress without a Scire facias ad computandum, as 38 Ed. 3. 12. 25 Ed. 3. 1. & 37. And in Michaelmas Term following it was argued again by Shaftoe for the Avowant, That the distress was lawful, and that he might well maintain it, without a Scire facias ad computandum. And Rolls Serjeant for the Plaintiff much insisted, That for as much as the Conusee comes in by matter of Record, that without matter of Record he cannot be *ousted* by one who claims under the Conusor: And therefore the Grantee cannot distrain without first suing a Scire Facias. Berkeley answered, That true it is, none who claims Estate in Land under the Conusor, after the Statute acknowledged, can enter or avoid the Extent, without a Scire facias or Venire facias ad computandum; wherein, if it appears that he hath taken the profits of the Land after the time of the Extent satisfied, he shall be allowed for them, and shall answer for the profits so tortiously taken. But Grantee of a Rent, after the Extent satisfied, may well distrain, so may Grantee of a Common; for they claim no interest in the Land, but profits out thereof; wherefore he cannot have a Scire facias or a Venire facias ad computandum; for he ought not to account with them, and therefore may distrain or put in his Cattel to take the profits, otherwise he should be without remedy, for which, &c. And I was of the same opinion; And that the Rule holds not always good, that where one comes in by matter of Record, he ought not to be *ousted* without a Scire facias or matter of Record: For he whose Lands are extended upon an Elegit upon a Recognisance, after the Debts be satisfied, may enter without Scire facias; but the Conusee of a Statute (because he is to have

3 Cr. 152.

Dyer 1. b.

Co. Lit. 315. b. Yelv. 12. Moor 662.

Co. 4. 87. b.

Costs

Costs or Damages, which be not known) cannot be *ousted* without a Scire facias, wherefore, &c. And, the other Justices being absent, Rule was given, That Judgment should be entred for the Avowant, unless, &c.

..... *versus* Stringer. Hill. 15 Car. rot. 2.

TRespas for breaking his Close in Culham, &c. The Defendant pleads, quoad the breaking of parcel thereof in Culham, containing 42 acres, That Sir John Prisot and his Wife were seized of the Manor of Culham, and of the said 42. acres, parcel of the said Manor, and of a Messuage and two Yard-lands, parcel of the said Manor, in right of his wife, for her life, Remainder over to J. S. And that they joyned in a Fine *sur Conusance de droit come ceo, &c.* of the said Messuage, and two Yard-lands to the Defendant, and granted them to the Defendant and his Heirs; and further by the said Fine, granted unto him Common for four Horses and five Beasts, and two hundred Sheep in the said Manor and Lands in Culham, and avers the life of the said *Baron*, and that he put in his Cattel to use the Common, &c. And quoad his breaking the other part of the Close he pleads, and shews a Lease for 99. years. Upon these Pleas the Plaintiff demurred, and it was shewn for cause, That the first Plea is not good, because he doth not plead, That it was Waste or Common, &c. otherwise he might not claim Common, unless in Land commonable: But Berkeley and my self held, That it was no cause of exception; but by the Plea (as the Fine is) he may claim Common in any part of the Manor; For there is not any restraint to the Wasts or Commons, but it is granted generally in his Manor, and not like to the Case in 9 H. 6. Grant of Common ubicunque & quandocunque averia sua ierint for there he ought to aver that the Cattel of the Grantor went in the same place: But Berkeley said, The clause of Quandocunque averia sua ierint is void, because it restrains all the effect of the Grant; For if the Grantor will not put in his Cattel, he never shall have his Common: But I held the said restraint to be good; For he shall not have it, but when the Grantor hath Cattel there; and he is not totally restrained: And Modus & conventio vincunt legem; For it is not intendable, That the Grantor would totally forbear to put in his Cattel to defraud the Commoner of his Common: But for the principal point we both agreed cæteris Justiciariis absentibus) to give Judgment for the Defendant, That that part of the Plea was good. But for the other part, wherein the Lessee prescribes to have Common, it is clearly ill; wherefore it was adjudged for the Plaintiff, that this Plea was not good. 20. 1 Rol. 403.

Termino

Termino Hillarij, anno decimo ſexto *Caroli* Regis, in Banco Regis.

1. MEmorandum, That Sir *William Jones* Knight, one of the Juſtices of the Kings Bench, died at his Houſe in *Holbourn* upon the Ninth of December, and according to his own appointment, was buried in the Walks under *Lincolns Inn* Chappel; And Sir *Robert Heath* one of the Kings Serjeants, was appointed to be Juſtice of the Kings Bench in his place. And upon the firſt Tueſday in Term, the ſaid Sir *Robert Heath* was ſworn Juſtice of the Kings Bench.

2. MEmorandum, That the firſt day of this Term, being Saturday, Sir *Edward Littleton* Knight, who was chief Juſtice of the Common Bench, was deſigned and appointed to be Lord Keeper of the great Seal; And (having had the Seal delivered unto him by the King, at *Whitehall* the Wedneſday before, and ſworn there the ſame day to be Lord Keeper thereof, by the Lord Treaſurer, and the Earl of *Pembroke* Lord Chamberlain) ſigned divers Writs, in the interim betwixt that and the Term. And Sir *John Banks* Attorney General, was deſigned by the King to be chief Juſtice of the Common Bench; And divers Lords and others accompanied him to *Weſtminſter*: And all the Juſtices, and Barons, and Maſter of the Rolls attended the ſaid Lord Keeper to *Weſtminſter*, and yet notwithſtanding he continued chief Juſtice of the Common Bench; And upon Wedneſday, *Quindena Hillarij*, the ſaid Lord Keeper ſate in the Common Bench, as chief Juſtice there, not in his Robes, but in his long Gown and Hat, as the Lord Keeper uſeth to ſit, and ſwore a Philizer there, which Office he gave as chief Juſtice of the Common Bench, and afterwards went into Chancery: And then Sir *John Banks* appeared before him, by virtue of a Writ returned unto him, to take the degree of a Serjeant at Law: And after a ſpeech made unto him by the Lord Keeper, and his anſwer of humble thanks to the King for his grace and favour, he was ſworn Serjeant; and after went into the Kings Bench, and made a motion within the Bar as Kings Attorney; And the next day, being Thurſday, he performed his Ceremonies in *Serjeants-Inn-Hall* in *Fleetſtreet*, and went unto *Weſtminſter* in his party coloured Robes, with the Warden of the *Fleet*, and other Officers attending upon him, and kept his Feaſt in *Serjeants-Inn-Hall*; And the next day, being Friday, he was ſworn chief Juſtice of the Common Bench; And afterwards, the ſame day, *Herbert* the Kings Solicitor was made Attorney General, and Mr. *St. John* of *Lincolns-Inn* was made the Kings Solicitor.

Chambers

Chambers *versus* Sir Edward Brumfeild, late Major of London.

TRespas of false Imprisonment, for committing the Plaintiff to the Prison at Newgate. The Defendant justifies by vertue of the Kings Writ, dated 4 Aug. 11 Caroli, for not paying of money assessed upon him, towards finding of a Ship. And being argued at the Bar this Term, it was now moved to have Judgment without any further argument, Because it had been voted and resolved in the Upper-house and the House of Commons, nullo contradicente, That the said Writ, and what was done by colour thereof, was illegal; therefore the Court would no further dispute thereof, but gave Judgment for the Plaintiff. 3. Ante 524.

The Lord Greys Case.

MEmorandum, That in this Parliament a Question was moved concerning the Barony of *Ruthen*, where the Case was, That one being created a Baron to him and his Heirs, hath Issue a Son and a Daughter by one *Venter*, and a second Son by another *Venter*, and the eldest Son hath the Barony, and sits in Parliament, and afterward dies without Issue, Whether the second Son shall have that dignity as Heir to his Father, Or the Sister shall have it as *possessio Fratris*, in Lands, &c. and desired to have the opinion of the Judges therein? And all the Justices resolved, That there is not any *possessio Fratris* of a dignity; but it shall descend to the Son; For the younger Son is *Hæres natus*, and the Sister is only *Hæres facta* by the possession of her Brother, of such things as are in demeasn, but not of Dignities and such like, whereof there cannot be an Acquisition of the possession, according to *Co. Lit. 15. b. & Co. lib. 3. fol. Ratcliffs Case, fol. 42. a.* 4.

Gertrude Bacon *versus* James Bacon and three others.
Trin. 16 Car. rot. 456.

TRespas of his Close breaking in Cramford. Upon Not guilty pleaded, a special Verdict was found, That Thomas Bacon, late of Cramford aforesaid, was seized in Fee of the Tenements in the Declaration mentioned, and had Issue John and Thomas, and 15 Octob. anno 1610. died so seized, which descended to the said John; who, being a Merchant, went beyond Seas to Elvin in Prussia, which is in the Dominions of the King of Poland, ad Merchandizandum, and used the Trade of a Merchant there; and during his trading, espoused there Elizabeth the daughter of Francis Cockley an English man, who exercised the Trade of a Merchant in partibus transmarinis: And that 31 August 1615. the said John Bacon died, the said Elizabeth his wife being *grosse ment enseint* with the said Gertrude now the Plaintiff, which Gertrude was born the 31 Octob. 1615. apud Elvin aforesaid; 5.

And that the ſaid Thom. Bacon was brother of the whole blood to the ſaid John; and that the Plaintiff is the ſole daughter and iſſue of the ſaid John; and that ſhe, the Plaintiff, entred into the ſaid Tenements, and was ſeized, prout Lex poſtulat. And the ſaid James, as Son and Heir of the ſaid Thomas Bacon, entred and *ouſted* her, and continued the poſſeſſion, prout in the Declaration, &c. Et ſi ſuper totam materiam, &c. the Court ſhall adjudge for the Plaintiff, they find for the Plaintiff, and aſſeſs Damages 12 s. and Coſts; And if, &c. This being argued at the Bar, Brampſton, Berkeley, and my ſelf agreed, That Judgment ſhould be given for the Plaintiff: For her Father being an Engliſh Merchant and living beyond the Seas for Merchandizing, his Daughter is
3 Cr. 3. born a Denizen, and ſhall be Heir unto him: And it is not ma-
Co. 7. 18. a. terial although his Wife be an Alien, for ſhe is, as Berkeley ſaid, ſub poteſtate Viri, and quaſi under the Allegiance of our King: And, as Brampſton ſaid, although the Civil Law is, That partus
Co. Lit. § 187. ſequitur ventrem, yet it is not ſo in our Law; but the child ſhall be of the Fathers condition: And he being an Engliſh Merchant, and reſiding there for Merchandizing, his Children ſhall, by the Common Law; or rather, as Berkeley ſaid, by the Statute of 25 Ed. 3. be accounted the Kings Leiges, as their Father is. And they all agreed the ſooner in this opinion, by reaſon of a Caſe vouched to be adjudged ſecundo Car. which I remember was argued in the Dutchy Court, before Hobart and Yelverton Juſtices, aſſiſting there, where one Stephens, being a Merchant, went over the Seas, and reſided for his Merchandizing, and there had Children, they reſolved, by the advice of the other Juſtices, That thoſe Children were Denizens; And it is entred there accordingly. And ſo in this Caſe it was agreed, and Judgment was given for the Plaintiff.

Prinſors Caſe.

6. EDward Prinſor, Conſtable of Offenham, was brought into Court upon an Attachment of contempt; Where it appeared by his Examination, That he had arreſted one Anth. Haſlewood Eſq; in the Church-yard, upon a Sunday, as he came from Divine Service, by a Proceſs for the Good-behaviour, out of the Seſſions, when the ſaid Anthony Haſlewood ſhewed him, that he had a Cerciorari out of this Court. But he pretending he could not read, arreſted and detained him, until he went unto another houſe, and procured it to be read to the ſaid Prinſor, who then diſcharged him. And for this contempt, becauſe he was arreſted upon a Sunday, immediately after Divine Service, whereas he might have arreſted him upon any day of the week, the ſaid Prinſor was fined 20 s. And for arreſting and detaining him after the Writ of Cerciorari ſhewn (his ignorance not excuſing him) he was ordered to be bound with Sure-
Ante 395. ties to the Good-behaviour: But the fine and impriſonment were
Co. 10. 76. b. diſcharged, Becauſe the arreſt was by Proceſs of the Seſſions of Peace,

Peace, although the Court declared, It was not well awarded according to the Statute of 21 Jacobi.

Kings *verſus* Hilton and his Wife. Trin. 16 Car.

DEbt againſt *Baron* and *Feme*, Adminiſtratrix of her former Husband. Judgment being given againſt them, upon a Fieri facias, the Sheriff returned Nulla bona &c. of the Inteſtate. Hereupon another Fieri facias was awarded againſt the *Baron* and *Feme*, with a clauſe in the Writ, That if it be found, that the ſaid *Baron* and *Feme* devaſtaverunt Bona & ſi conſtari poterit, tunc fieri facias, &c. Vide Cok. Rep. lib. 5. fol. 32. Petifers Caſe. And the Sheriff returned, that they had not in their hands any of the Goods of the Inteſtate: But that the *Feme*, being Adminiſtratrix to her firſt husband, had goods of the value of 100 l. of the ſaid Inteſtates, and had waſted them during her widowhood, and the husband had not waſted any of them; Et ſi devaſtaverunt according to the Writ, the Jury prayed the diſcretion of the Court. And it was argued by Rolls, Serjeant, for the Plaintiff, That it was a devaſtation in both. And the Court held, That the Sheriffs return of the Enquiſition, finding this matter, was good enough: wherefore it was adjudged for the Plaintiff. 7. 1 Rol. 931. Ante 519. Ante 519. 1 Rol 931.

Ball *verſus* Trelawny. Paſch. 16. Car.

BIll againſt the Defendant in cuſtodia Mareſchalli, upon the Statute of 2 Hen. 4. cap. 11. for ſuing in the Admiral Court upon a Contract made on the Land at New England, and not ſuper altum Mare; where the Defendant had obtained Judgment in the Admiral Court, and taken the party in execution for 112 l. And after Verdict here found for the Plaintiff, Hales moved in arreſt of Judgment, firſt, For that the Suit is by Bill, and not by original Writ, as the Statute appoints: But in regard it was returned, That he was in cuſtodia Mareſchalli, and he could not otherwiſe have his remedy, It was held to be well enough. Secondly, For that, being at New-England, it was not alledged to be in partibus tranſmarinis. And the Court, viz. Brampſton, Berkeley, Heath and my ſelf, held, That it is out of the Admirals Juriſdiction, and that he hath no authority to meddle therewith: Wherefore it was adjudged for the Plaintiff. And the Friday following, he appearing upon an Habeas Corpus, and this cauſe returned; and that he was in execution for this cauſe only, (which they held to be coram non Judice) the party was diſcharged. 8. 1 Rol. 537. Ante 296. 1 Rol. 537. 4 Inſt. 134. Hob. 11.

Die Martis 12° *Novembris* 1667.

UPon a Report made by Mr. *Vaughan* from the Committee concerning Freedom of Speech in Parliament.

Reſolved, &c.

THat the Houſe do agrée with the Committee, That the Act of Parliament in 4 Hen. 8. commonly entituled an Act concerning Richard Strowd, is a General Law extending to indempnifie all and every the Members of both Houſes of Parliament, in all Parliaments, for and touching any Bills, ſpeaking, reaſoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of, and is a Declaratory Law of the ancient and neceſſary Rights and Priviledges of Parliament.

Pryas Anim. 12.

Die Sabbati 23° Novembris 1667.

Reſolved, &c.

THat the Judgment given 5 Car. againſt Sir John Elliot, Denzel Hollis, and Benjamin Valentine in the Kings Bench is an illegal Judgment, and againſt the freedom and priviledge of Parliament.

Ante 182.

Die Sabbati 7° Decembris 1667.

Reſolved, &c.

THat the Concurrence of the Lords be deſired to the Votes of this Houſe concerning freedom of Speech in Parliament, and that a Conference be on Monday next deſired to be had with the Lords, at which time the Votes may be delivered, and reaſons for them given.

Die Jovis 12° Decembris 1667.

A Meſſage from the Lords by Sir William Childe and Sir Thomas Eſtcourt.

Mr. Speaker,

THe Lords have Commanded us to acquaint you, that they agree with this Houſe in the Votes delivered them at the laſt Conference concerning Freedom of Speech in Parliament.

Die

Die Mercurij 11° Decembris 1667.

NExt the Lord Chamberlain and the Lord *Aſhley* reported the effect of the Conference with the Houſe of Commons yeſterday, which was managed by Mr. *Vaughan*, who ſaid he was commanded by the Houſe of Commons to acquaint their Lordſhips with ſome Reſolves of their Houſe concerning the Freedom of Speech in Parliament, And to deſire their Lordſhips concurrence therein.

In order to which he was to acquaint their Lordſhips with the reaſons that induced the Houſe of Commons to paſs thoſe Reſolves.

He ſaid the Houſe of Commons was accidentally informed of certain Books publiſhed under the name of Sir *George Crokes Reports*, in one of which there was a Caſe publiſhed, which did very much concern this great Priviledge of Parliament. And which paſſing from hand to hand amongſt the men of the long Robe, might come in time to be a received opinion as good Law.

The Houſe of Commons conſidering the conſequence, did take care that this Caſe might be inquired into, and cauſed the Book to be produced, and read in their Houſe, and he thought it the next and cleareſt way to inform their Lordſhips, is to read the Caſe it ſelf, which is *Quinto Caroli primi Michaelmas Term*, which Caſe was read as followeth.

The King *verſus* Sir John Elliot, Denzel Hollis and Benjamin Valentine.

AN Information was exhibited againſt them by the Atturney General, reciting, That a Parliament was ſummoned to be held at Weſtminſter 17 Martij 3 Caroli Regis ibidem inchoat. And that Sir John Elliot was duly elected and returned Knight for the County of Cornwall, and the other two Burgeſſes of Parliament for other places; And Sir John Fynch choſen Speaker. That Sir John Elliot Machinans & intendens omnibus viis & modis ſeminare & excitare diſcord, evil will, murmurings, and ſeditions, as well verſus Regem, Magnates, Prælatos, Proceres & Juſticiarios, et reliquos Subjectos Regis, et totaliter deprivare et ſubvertere Regimen et gubernationem Regni *Angliæ*, tam in Domino Rege quam in Conciliariis & Miniſtris ſuis cujuſcunque generis, et introducere tumultum et confuſionem in all eſtates and parts, et ad intentionem, that all the Kings Subjects ſhould withdraw their affections from the King, the 23th of Febr. Anno 4 Car. in the Parliament, and hearing of the Commons, falſo, malitioſe, et ſeditioſe uſed theſe words, The Kings Privy Council, his Judges, and his Council learned, have conſpired together to trample under their feet the Liberties of the Subjects of this Realm, and the Liberties of this Houſe.

And

And afterwards upon the ſecond of March Anno 4. aforeſaid, the King appointed the Parliament to be adjourned until the 10th of March next following, and ſo ſignified his pleaſure to the Houſe of Commons; And that the three Defendants the ſaid ſecond day of March 4 Car. malitioſe agreed, and amongſt themſelves conſpired to diſturb and diſtract the Commons, that they ſhould not adjourn themſelves according to the Kings pleaſure before ſignified; And that the ſaid Sir John Elliot according to the agreement and conſpiracy aforeſaid had maliciouſly in propoſitum et intentionem prædictam in the Houſe of Commons aforeſaid ſpoken theſe falſe, pernicious, and ſeditious words precedent, &c. And that the ſaid Denzel Holles, according to the agreement and conſpiracy aforeſaid between him and the other Defendants, then and there falſo, malitioſe, et ſeditioſe uttered hæc falſa, malicioſa et ſcandaloſa verba precedentia, &c. And that the ſaid Denzel Holles, and Benjamin Valentine ſecundum agreamentum & conſpirationem prædict. &c. ad intentionem et propoſitum prædict. uttered the ſaid words upon the ſaid ſecond day of March, after the ſignifying the Kings pleaſure to adjourn; And the ſaid Sir John Finch, the Speaker, endeavoured to get out of the Chair, according to the Kings Command, They vi et armis manu forti et illicito aſſaulted, evil intreated, and forcibly detained him in the Chair; and afterwards being out of the Chair they aſſaulted him in the Houſe, and evil entreated him, et violenter manu forti et illicito drew him to the Chair, and thruſt him into it. Whereupon there was great tumult and commotion in the Houſe, to the great terror of the Commons there aſſembled, againſt their Allegiance in maximum contemptum, and to the diſheriſon of the King, his Crown and Dignity, for which &c. To this Information the Defendants appearing, pleaded to the Juriſdiction of this Court, That the Court ought not to have Conuſans thereof, becauſe it is for offences done in Parliament, and ought to be there examined and puniſhed, and not elſewhere. It was thereupon demurred, and after argument adjudged, That they ought to anſwer, for the Charge is for conſpiracy, ſeditious acts and practiſes, to ſtop the adjournment of the Parliament, which may be examined out of Parliament, being ſeditious and unlawful Acts; and this Court may take Conuſance and puniſh them; afterwards divers Rules being given againſt them, viz. Sir John Elliot, that he ſhould be committed to the Tower, and ſhould pay 2000 l. Fine, and upon his enlargement ſhould find Sureties for his good behaviour; And againſt Holles, that he ſhould pay a thouſand Marks, and ſhould be impriſoned, and find Sureties &c. And againſt Valentine, that he ſhould pay 500 l. Fine, be impriſoned and find Sureties.

Then Mr. *Vaughan* laid much Emphaſis upon the word *machinans & intendens*, &c. and then went on, That the Houſe of Commons had

had not only read the Case as it was in the Book, but did look into the Record, where in the Information it self they found some considerable differences from the Print, As that the Crime alledged consisting partly of Words spoken in the House, partly of Criminal Actions pretended to be committed; The Gentlemen accused pleaded severally, namely specially to the Words, and a several Plea apart to the Criminal Actions; But the Court dealt so craftily that they over-ruled the whole Plea, mingled together and took it in General, so that perhaps whatsoever was Criminal in the Actions might serve for a Justification of their Rule, and might make it seem in time to become a President, and a Ruled Case against the liberty of Speech in Parliament, which they durst not singly and bare-fac'd have done.

The House of Commons did take care to enquire what ancient Laws did fortifie this the greatest Priviledge of both Houses, and they found in the fourth year of *Henry* the Eighth, An Act concerning one *Richard Strowd*, who was a Member of Parliament, and was fined at the Stannery Courts in the West for condescending and agreeing with other Members of the House to pass certain Acts to the prejudice of the *Stanneries*; This Act was made occasionally for him, but did reach to every Member of Parliament that then was, or shall be; The very words being, viz.

And over that it be Enacted by the same Authority that all Suits, Accusements, Condemnations, Executions, Fines, Amercements, Punishments, Corrections, Grievances, Charges and Impositions, put or had, or hereafter to be put or had unto, or upon the said Richard, and to every other of the person or persons afore-specified that now be of this present Parliament, or that of any Parliament hereafter, shall be for any Bill, Speaking, Reasoning or Declaring of any Matter or Matters concerning the Parliament to be commenced and treated of, be utterly void, and of none effect. And over that, Be it Enacted by the said Authority, That if the said Richard Strowd, or any of all the said other Person or Persons hereafter be vexed, troubled, or otherwise charged for any causes as is aforesaid, that then he or they, and every of them so vexed or troubled of or for the same, to have Action upon the Case against every such Person or Persons so vexing or troubling any, contrary to this Ordinance and Provision in the which Action the Party grieved shall recover treble Damages and Costs, and that no Protection, Essoyne, nor wager of Law in the said Action in any wise be admitted nor received.

He said, 'tis very possible the Plea of those worthy Persons, *Denzel Holles*, Sir *John Elliot*, and the rest, was not sufficient to the Jurisdiction of the Court, if you take in their Criminal Actions altogether; but, as to the Words spoken in Parliament the Court could have no Jurisdiction while this Act of 4 *Hen.* 8. is in force, which extends to all Members that then were (or ever should be) as well

well as *Strowd*; and was a publick general Law though made upon a private and a particular occaſion.

He recommended to their Lordſhips the conſideration of the time when theſe Words in the Caſe of Sir *George Crokes* Reports were ſpoken, which was the ſecond of *March*, 4 *Caroli primi*, being in that Parliament which began in the precedent *March*, 3 *Carol.* at which time the Judgment given in the Kings Bench about *Habeas Corpus* was newly reverſed, which concerned the freedom of our perſons, the liberty of Speech invaded in this caſe; and not long after the ſame Judges (with ſome others) joyned with them in the Caſes of Ship-money, invaded the propriety of our Goods and Eſtates; ſo that their Lordſhips find every part of theſe Words for which thoſe worthy perſons were accuſed, Juſtified.

If any man ſhould ſpeak againſt any of the great Officers, as the Chancellor or Treaſurer, or any of the reſt recited in thoſe Acts, as by accuſing them of Corruption, ill Counſel, or the like, he might poſſibly juſtifie himſelf by proving of it; but in this Caſe it was impoſſible to do it, becauſe thoſe Judgments had preceded and concluded him, for he could make none, but by alledging their own Judgements which they themſelves had reſolved, and would not therefore allow to be Crimes, which they had made for Laws.

He did inform their Lordſhips that the Bill in the Rolls hath another Title then that he did mention; this being that, that the Clarks knew it by, rather than the proper Title.

The Words in the Caſe are charged *ea intentione*, which ought not to be; for it is clear, and undoubted Law, that whatever is in it ſelf lawful, cannot have an unlawful intent annexed to it. Things unlawful may be made an higher Crime by the illneſs of the intent; for inſtance, taking away my Horſe is a Treſpaſs only, but intending to ſteal him makes it Felony: borrowing my Horſe, though intending to ſteal him is not felony, becauſe borrowing is lawful; and there were no uſe of freedom of ſpeech otherwiſe, for a depraved intention may be annexed to any the moſt juſtifiable Action: If a man eat no fleſh he may be accuſed for the depraved intention of bringing in the *Pythagorian* Religion and ſubverting the *Chriſtian*: If a man drink water, he may be accuſed of the depraved intention of Subverting the Kings Government, by deſtroying his Revenue both of Exciſe and Cuſtome.

No man can make a doubt, but whatſoever is once Enacted is lawful; but nothing can come into an Act of Parliament but it muſt be firſt offered or propounded by ſome body, ſo that if the Act can wrong no body, no more can the firſt propounding; the Members muſt be as free as the Houſes; An Act of Parliament cannot diſturbe the State, therefore the Debate that tends to it cannot, for it muſt be propounded and debated before it can be Enacted.

In the Reign of *Henry* the Eighth, when there were ſo many perſons taken by Act of Parliament out of the Lords Houſe, as the Abbots and Priors, and all the Religious Houſes and Lands taken away, It had

had been a ſtrange Information againſt any Member of Parliament then, for propounding ſo great an alteration in Church and State.

Beſides, Religion it ſelf began then to be altered, and was perfected in the beginning of *Edward* the Sixths Reign, and returned again to Popery in the beginning of Queen *Maries*; and the Proteſtant Religion reſtored again in the beginning of Queen *Elizabeths*.

Should a Member of Parliament in any of theſe times have been juſtly informed againſt in the Kings Bench for propounding or debating any of theſe alterations: So that their Lordſhips perceive the reaſons and inducements the Houſe of Commons had to paſs theſe Votes now preſented to their Lordſhips,

After theſe Votes were read, viz.

Reſolved, &c.

THat the Act of Parliament 4 Hen. 8. commonly entituled, An Act concerning Richard Strowd, is a General Law, extending to indempnifie all and every the Members of both Houſes of Parliament, in all Parliaments, for and touching any Bills, ſpeaking, reaſoning, or declaring of any matter or matters in and concerning the Parliament, to be communed and treated of, and is a Declaratory Law of the ancient and neceſſary Rights and Priviledges of Parliament.

Reſolved, &c.

THat the Judgment given 5 Car. againſt Sir John Elliot, Denzel Holles, and Benjamin Valentine Eſquires, in the Kings Bench, was an illegal Judgment, and againſt the freedom and priviledge of Parliament.

To both which Votes the Lords agree with the Houſe of Commons.

UPon conſideration had this day of a Judgment given in the Court of Kings Bench in Michaelmas Term, in the fifth Year of King Charles the Firſt, againſt Sir John Elliot Knight, Denzel Holles, and Benjamin Valentine Eſquires, which Judgment is found to be erroneous; It is ordered by the Lords Spiritual and Temporal in Parliament aſſembled, That the ſaid Denzel Holles Eſquire (now Lord Holles, Baron of Ifeild) be deſired to cauſe the Roll of the Court of Kings Bench wherein the ſaid Judgment is recorded, to be brought before the Lords in Parliament by a Writ of Error, to the end that ſuch further Judgment may be given upon the ſaid Caſe, as this Houſe ſhall find meet.

A Meſſage was ſent to the Houſe of Commons by Sir William Childe, and Sir Juſtinian Lewin, to acquaint them, that the Lords do agree to thoſe Votes which were delivered at the Conference yeſterday.

Die Mercurij 15° April 1668.

WHereas Counsel have been this day heard at the Bar, as well to argue the Errors assigned by the Lord Holles, Baron of Ifeild, upon a Writ of Error depending in this House, brought against a Judgment given in the Court of Kings Bench in 5 Car. 1. against the said Lord Holles, by the name of Denzel Holles Esq; and others; As also to maintain and defend the said Judgment on his Majesties behalf: Upon due consideration had of what hath been offered on both parts thereupon, the Lords Spiritual and Temporal in Parliament, do order and adjudge, That the said Judgment given in the Court of Kings Bench in 5 Car. 1. against the said Denzel Holles and others, shall be reversed.

The form whereof (to be affixed to the Transcript of the Record) followeth;

ET quia Curia Parliamenti de Judicio suo de & super præmissis reddend' nondum advisatur, dies datus est tam prædict. Galfrido Palmer *Militi & Baronet, qui sequitur, &c. quam prædict.* Denzel *Domino* Holles *coram eadem Curia usque ad diem* Mercurij *decimum quintum diem* Aprilis *tunc proximum sequentem apud* Westmonast. *in Comitat.* Midd. *de judicio suo inde audiend. eo quod Curia prædict. nondum, &c. Ad quem diem coram Curia prædict. venit tam prædict.* Galfridus Palmer *qui sequitur, &c. quam prædictus* Denzel *Dominus* Holles *in propriis personis suis. Super quo, visis, & per eandem Curiam nunc hic plenius intellectis omnibus & singulis præmissis, maturaque deliberatione inde habita, Consideratum est per Curiam prædictam. Quod Judicium prædict. ob errores prædictos & alios in Recordo & Processu prædictis compertos Revocetur, Adnulletur & penitus pro Nullo habeatur. Et quod prædict.* Denzel *Dominus* Holles *ad omnia quæ idem* Denzel *Dominus* Holles *occasione Judicij prædict. amisit, Restituatur.*

Jo. Browne, *Cleric. Parliamentorum.*

An

An Alphabetical Table of the Names of the Principal Caſes adjudged and Reported in this Book.

A

Abdy, Alderman of *London* his Caſe *pag.* 585
Acton *v.* Symon 414
Adams *v.* Hilks 164
Adams *v.* Lord Warden of the Stanneries 333
Anonimi, 96, 139, 145, 201, 202, 229, 233, 264, 280, 297, 316, 336, 337, 339, 380, 403, 413, 464, 472, 499, 509, 561, 571, 579, 580, 596.
Anſley *v.* Chapman 157
Angel *v.* Sir William Cooper 517
Appleton *v.* Stoughton 516
Arundell *v.* Saunders 502
Arundell *v.* Mare 552
Arſcott *v.* Heale 6
Aſpie *v.* Pembridg 597
Aſcoughs Caſe in the Court of Wards 525
Atkey *v.* Heard 219
Audley *v.* Halſey 148
Ayleſworth *v.* Chadwell 38

B

Babington *v.* Wood 180
Bachellor *v.* Gage 188
Bacon *v.* Bacon 601
Bagnal *v.* Knight 553
Baker *v.* Hacking 387, 405
Baker *v.* Breerman 418
Baker *verſus* Willis & others 476
Baldry *v.* Packard 46
Ball *v.* Baggerley 326
Ball *v.* Trelawny 603
Banniſters Caſe 38
Barnaby *v.* Rigalt 301
Barkams Caſe 507
Bardſey *v.* Clyfton 541
Barfoot *v.* Norton 559
Bathels Caſe 570
Baynes *v.* Brighton 515
Bayly *v.* Offord 137
Bauderock *v.* Mackaller 330
Beale *v.* Beale 383
Beamond *v.* Long 208, 227
Beare *v.* Woodley 154
Bells Caſe 449
Benſon *v.* Flower and Blackwell 166
Sir Simon Bennets Caſe 104
Sir John Bennet *v.* Eaſden 55
Benſteds Caſe 583
Bethyll *v.* Parry 189
Berry *v.* Heard 242
Bigot *v.* Smith 102
Birt *v.* Manning 425
Bland *v.* Inman 288
Blage *v.* Gold 447, 473
Blunden *v.* Baugh 302
Blyzard *v.* Barns 307
Sir John Bodvell *v.* Bodvell 170
Bord *v.* Cudmore 83
*B*oulton *v.* *B*anks 254
*B*oreton *v.* Nicholls 363, 401

Bower and his wife *verſus* Cooper 486
Bradſtock *v.* Scovell 434
Brett *v.* Read 343
Brices Caſe 593
Brikendens Caſe 9
Brian *v.* Cockman 322
Bryan *v.* Wikes 572
Bryan *v.* Wetherhead 17
Brown *v.* Taylor 38
Brown *v.* Hancock 115
Ld. Brooks *v.* Ld. Goring 197
Broxhorn *v.* Dagar 320
Bull *v.* Wiatt 388
Bumſteds Caſe 438,448
Butler *v.* the Preſident of the Colledge of Phyſicians 256
Burgoin *v.* Spurling 273,283.
Burgeſſes Caſe 365
Buſhel and others *v.* Yaller 408
Burwell and Harwells Caſe 597

C

Calmadies Caſe 595
Canway *v.* Aldwin 573
Caroons Caſe 8,9
Carlion *v.* Mills 291
Caſtle *v.* Hobbs 21
Lady Cavendiſh *v.* Middleton 141
Cawdry *v.* Higheley 270
Ceeley *v.* Hopkin 474,480
Ceeley *v.* Hoskins 509
Chambers Caſe 133,168
Chambers *v.* Bromfield 601
Chamberlain *v.* Turner 129
Chapman *v.* Chapman 76
Chapman *v.* Allen 271
Chapmans Caſe 340
Chedleys Caſe 331
Lady Chicheſley *v.* Thomſon 104
Child *v.* Greenhill 553
Cholmleys Caſe 464
Claphams Caſe 79
Claxton *v.* Lylborn 522
Cleve *v.* Veer 450,457
Clothworthy *verſus* Clothworthy 436
Codrington *v.* Rodman 198
Sir Edw. Cokes, Sheriff, &c. 25
Coke *v.* Younger 16
Coke *v.* Dowze 241
Coke *v.* Coke 531
Cooks Caſe 537
Collis *v.* Malon 282
Congham *v.* King 221
Copland *v.* Pyott 244
Coopers Caſe 544
Corbet *v.* Bans 443
Sir William Courtney *v.* Sir Richard Greenvile 209
Cort *v.* Biſhop of St. Davids 341, 348
Cox's Caſe, 176
Crane *v.* Crampton 31
Crane *v.* Holland 138
Crayford *v.* Crayford 106
Crawleys Caſe 567
Sir Randal Crew *v.* Sir George Vernon 97
Cripps *v.* Gryſill 37
Criſp *v.* Prat 548
Crowley *v.* Dawſon 204
Arth. Crohagens Caſe, 332
Crump *v.* Barne 31
Cule *v.* Executors of Thorn 186
Cucko *v.* Starre 285
Cuſacks Caſe 128

C

Dalby *v.* Dorthall 553
Daly *v.* Belamie 542
Daniel *v.* Count de Hertford 542
Darroſſe *v.* Newbott 143
Davenport *v.* Penſell 516
Davie *v.* Hawkins 53
Dawſon *v.* Lee 566
Decrow *v.* Jenkins 178
Delve *v.* Clerk 285
Denns Caſe 115
Dennis *v.* Payne 551
Derbie *v.* Hemming 593

Digbie *versus* White 426
Dike v. Ricks 335
Dodſon v. Lynn 475
Done v. Smethier & Leegh 415
Dow v. Golding 196
Down v. Hathwayte 416,418
Downs v. Winterflood 202
Dorcheſter v. Webb 372
Drake v. Corderoy 288
Drake v. Munday 207
Drakes Caſe 220
Sir John Dreydon, &c. v. Yates and the Bp. of Peterborough 585
Dunſcomb v. Smith 164
Sir Edw. Duncombs Caſe 366
Vicount Dunbarrs Caſe 349
Dymmock v. Fawcett 393

E

Eaton *verſus* Ayloff 110
Edgar and Webb v. Sorrel 169
Edwards v. Woodden 323
Edwards v. Rogers 524, 543
Eliot v. Skypp 338
Sir John Elliot & Hollis Caſe 181
Ellis v. Johnſon 261
Eve v. Wright, 75
Evans and Fynches Caſe 473
Evans and Cottingtons Caſe 506
Evelins Caſe 551
Eyres v. Eyres 51
Eyres v. Taunton 295,312

F

Facy v. Long 237,559
Fairwethers Caſe 348
Faveley v. Eaſton 269,276
Farrer v. Engliſh 19
Farington v. Prince 10
Farington v. Keymer 112
Fawkner v. Bellingham 80,214
Sir Gregory Fenner v. Nicholſon and Paſefeild 61
Fenns Caſe 314
Sir Henry Ferrers Caſe, 371
Fines *verſus* Norton 278
Fiſh v. Wagſtaff 318
Sir John Fitzherbert v. Fitzherbert 483,484,487
Flight v. Craſden 8
Flowers Caſe 211
Flower v. Elgar 214
Flower v. Baldwin 217
Forger v. Sales 147
Foſter v. Smith 31
Fortherbys Caſe 62
Freemans Caſe 579
Fryer v. Fawkenor 164
Fulwoods Caſe 482,484,488
492
Fynch v. Lamb 294

G

Gee *verſus* Freedland 47
Geery v. Reaſon 128
George v. Harvie 282,324
Gennings v. Lake 168
Gilpin *verſus* 161
Gilbert v. Fletcher 179
Girlings Caſe 446
Gobbets Caſe 339
Goodyear v. Flatt 471
Goodyear v. Biſhop 265
Goldſmith v. Sydnor 362
Goodwin v. Sir Rich. Moor 161
Goodwin v. Ann Weſt 522,540
Goſhawk v. Chiggell 154
Gray v. Felder 209
Lord Grays Caſe 608
Greens Caſe 16
Green v. Guy 146
Green v. Lincoln 318
Groſſe v. Gayer 172
Gryffyth v. Jenkins 178
Gryffyth v. Byddle 275
Gryffyth and his Wife v. Lewis and his wife 444
Gryffyths Caſe 390
Gryſyle v. Whitcock 283
Gwyn v. Gwyn 310
Gybbs v. Wibourn 526
Gymlet v. Sands 391

H

Hall *verſus* Marſhal 497
Halleys Caſe 87
Halley *v.* Stanton 268
Halloways Caſe 131
Hallyday *v.* Oxenbrig 234
Haymond *v.* Dod 5
Harriſons Caſe 503
Harlow *v.* Wright 195
Harris *v.* Richards 272
Harts Caſe 350
Hawkins *v.* *B*ilhead 404
Hayes *v.* Hayes 433
Lord Haſtings *v.* Sir Archibald Douglaſs 343
Anne Healing *v.* Lord Major of London 574
Hearn *v.* Allen 57
Heller *v.* Hundred de *B*enhurſt 211
..... *v.* Heliers 175
Herbert *v.* Laughluyn 492
Hilton *v.* *B*embridge 440
Hilton *v.* Pawle 92
Hill *v.* Thornton 165
Hitcham *v.* Porter 286,419
Hinſley *v.* Wilkenſon 387
Hix *v.* Holingſhed 261
Hobert and Strouds Caſe 209
Hodges *v.* Moyſe and Scriven 45
Hodgkinſon *v.* Whood 23
Holms *v.* Savill 116
Holm *v.* Lucas 6
Holms Caſe 376
Holt *v.* Sambach 103
Hollingſheds Caſe 229
Hopeſtill *v.* Searle 386
Sir Charles Howards Caſe 59
Howell John *v.* Thomas 91
..... *v.* Hopkins 165
Houell *v.* *B*arns 382
Horn *v.* *B*arber 421
Hughs *v.* Farrer 141
Hughs *v.* *B*ennet 495
Hughs Caſe 196
Hughs *v.* Harris 229
Holm *v.* Heylock 200
Humphry *v.* Knight 455
Humphry *v.* Stanfeild 469
Hyot *v.* Hoxton and *B*roughton 153
Hynd *v.* *B*iſhop of Chicheſt. 237

I

James *verſus* Heyward 184
James *v.* Tutney 497,532
Jaxton *v.* Tanner 236
Jeffes Caſe 175
Jeffrys *v.* Payne 510
Jenkins *v.* Young 230
Jennings *v.* Vandeput 263
Jeroms Caſe 74
Jeſſon *v.* Laxon 254
Inkerſols *v.* Samms 130
Johns *v.* Rowe 106
Johns and Robinſon *v.* Dodſworth 192
Johns *v.* Stayner 272, 281
Johns *v.* Stratford 309
Johnſon *v.* Rowe 265
Johnſon *v.* Davie 327
Ireland *v.* *B*lockwell 570
Iſham *v.* York 14
Iſham *v.* Morrice 109
Juxon *v.* Thornhill 132

K

Kadwallader *v.* *B*rian 162
Keeley *v.* Manning 180
Kerchevall *v.* Smith 285
Kendall *v.* Fox 145
Kenion *v.* Davies 487
Kelland *v.* White 494
Earl of Kent *v.* Steward and Scot 358
Kemp *v.* *B*arnard 513
Kiffyn *v.* Vaughan 262
Kirtons Caſe in the Court of Wards 87
The King *v.* Maynard 231
The King and Codrington *v.* Rodman 198

King *verſus* Sir James Wingfield 251
King *v.* Elliot, Holles, and Valentine 181
King *v.* Hobart and Stroud 209
King and Barns *v.* Hill and Windſor 232
King *v.* Major and Commonalty of London 252
King *v.* Ward and Lyme 266
King *v.* Sherington Talbot 311
King *v.* Bagſhaw 347,361
King *v.* Archbiſhop of Canterbury and Prieſt 354
King *v.* Sir Baſil Brook 409
King *v.* Mynn 410
King *v.* Inhabitants of Epworth 439
King *v.* Rooks 491
King *v.* Hewayd 498
King and Informer *v.* Freedland 499
King againſt Sir John Dreyden 511,574
King *v.* Lord 204
King *v.* Edwards 320
King *v.* Coke 384
King *v.* Fitch 414,452
Kings *v.* Hilton 603
Knight *v.* Harvey 25
Kniveton *v.* Latham 490
Kynaſton *v.* Moor 89

L

Lacon *verſus* Barnard 35
Lakins *v.* Sir John Lamb and Holt 235
Lancelot *v.* Allen 248
Langham *v.* Bewett 68,69
Lancaſter *v.* Keyleygh 300
Langden *v.* Stokes 383
Langford-bridge 365
Levanns Caſe 201
Lawrence *v.* Woodward 277
Latham *v.* Atwood 515
Le Marchant *v.* Rawſon 274,278
Launder *v.* Brooks 561
Lawſons Caſe 507
Lawe *v.* Harwood 140
Lewknor *v.* Cruchley 140
Leycroft *v.* Dunker 317
Richard Lees Caſe 592
Lee *v.* Boothbye 521
Lee *v.* Ruſſel 560
Levetts Caſe 538
Leytons Caſe 584
Earl of Lincolns Caſe in Star-Chamber 64
Sir Martin Liſter *v.* Homes 544
Liſter *v.* Bromley 286
Love *v.* Platers 40
Long *v.* Nethercote 143
Lodg *v.* Hollowell 587
Major and Commonalty of London *v.* Alford 575
Lloyd *v.* Gregory 502
Lutterell *v.* Lea 297
Lynnet *v.* Wood 157

M

Marſhalls Caſe 9
March *verſus* Culpepper 70
Mariot *v.* Kinſman 219
Sir Wil. Maſham *v.* Bridges 223
Mathews *v.* Whetton 233
Major *v.* Talbott 285
Major *v.* Brandwood 260
Manning *v.* Fitzherbert 271
Mackaller *v.* Toderick 337,353, 361
Mayo *v.* Cogſhall 406
Mann *v.* Biſhop of Briſtow and Hide 505
Martyn *v.* Nicholls 573
Mead *v.* Perkins 261
Mead *v.* Thurman 393
Mead *v.* Sir John Lenthall 587
Meredith *v.* Jones 244
Merrick *v.* Hundred de Rapefgate 379
Sir Henry Mildways Caſe 59
Mills *v.* Mills 239,241

Miller and Johns *versus* Manwaring 397
Middlemore *v.* Goodale 503, 505
Sir Math. Mints Case 596
Morrice *v.* Prince 526
Morrice *v.* Fletcher 53
Lord Morley *v.* Bishop of Chichester in Star-chamber 67
Morley *v.* Pragnell 510
Moor *v.* Hodges 90
Morant *v.* Cummin 94
Morgan *v.* Green 187
Morgans Case 383
Mott *v.* Butler 236
Mounson *v.* Cleyton 255
Sir William Mounson *v.* Bourn 519, 526
Moulin *v.* Sir Joh. Dallison 484
Moyser *v.* Gray 446
Mulcarry *v.* Eyres 511
Mynn *v.* Coughton 109
Mynn *v.* Hynton 329

N

Nash *versus* Preston 190
Needler *v.* Symnel and his Wife 417
Netter *v.* Percival Brett 391, 395
Nevil *v.* South and Delabarr, 286
Nevison *v.* Whitley 501
Earl of Newport *v.* Sir Henry Mildmay 307
Nichols *v.* Walker and Carter 394
North *v.* Wingate 559
Norton *v.* Acklane 580
Norton *v.* Fermer 113

O

Orm *versus* Pemberton 589
Owen *v.* Thomas ap Rees 94
Owen *v.* Long 572
Oxford *v.* Rivet 79, 93
Earl of Oxford *v.* Waterhouse 574

P

Martin Pages Case 332
Palmer *versus* Knight 385
Parker *v.* Grigson 282
Parker *v.* Taylor 316
Parker *v.* Bleeke 568
Parkers Case 583
Peacock *v.* Steer 29
Isabel Peeles Case 113
Peto *v.* Pemberton 101
Earl of Pembrook *v.* Bostock and Green 173
Pewes Case 183
Pewe & his wife *v.* Jefferys 456
Penson *v.* Gooday 327, 329
Peck *v.* Ambler 349
Peard *v.* Johns 382
Perry *v.* Diggs 494
Perkinson *v.* Gilliford 539
Pelham *v.* Hemming 594
Phelps *v.* Lane 92
Pilchard *v.* Kingston 202
Pigot *v.* Pigot 531
Platt *v.* Plummer 24
Player *v.* Warn and Dewes 54
Plowden *v.* Oldford 582
Powell *v.* Plunket 52
Powell *v.* Sheen 531
Poynter *v.* Poynter 194
Porter *v.* Hutchman 315
Porters Case 461
Priest *v.* Wood 301
Prigions Case 341, 350
Price *v.* Parkhurst 420
Prinsors Case 602
Proctor *v.* Chamberlain 564
Prowses Case 389
Pruett *v.* Drake 300
Purchase *v.* Jeggon 78
Hugh Pynes Case 117

R

Randall *versus* Scory 313
Reymund *v.* Hundred de Oking 37

Rey-

Reymund *verſus* Burbage 580
Reynell v. Champernoon 228
Reve v. Malſter & *B*arrow 410
Reve v. Digby 495
Reignalds Caſe 63
Rhemes v. Humphreys 254
Roe and *B*ond v. Devys 563
Rowden v. Malſter 42
Rolt v. Sharp 77
Royſons Caſe 146
Rockey v. Huggens 220
Robenſon v. Cleyton 240
Roſe v. *B*ertlett 292
Roboldham v. Vanlech 378

S

Savern *verſus* Smith 7
Sands v. Trefuſes 575
Sands v. Trevillian 107,193
Vicount Say and Seal v. Stephens 135
Lord Says Caſe 524
Salvin v. Clerk 156
Salmon v. Percivall 196
Lord Savills Caſe 205
Sankill v. Stocker 224
Sanders v. Corniſh 230
Sacheverill v. Porter 482
Salter v. *B*rown 436
*B*iſhop of Salisbury v. Hunt 581
Scavage v. Hawkins 571
Seagood v. Hone 366
Seaman v. *B*igg 480
Seels Caſe 557
Shalmer v. Foſter 177
Shepheards Caſe 190
Sharps Caſe 352
Sherman v. Lylly 597
Sidley v. Doct. Mondford 63
Simms v. Smith 176,299
Skevill v. Avery 138
Slaters Caſe 470
Slocombs Caſe 442
Sloper v. Child 595
Smart v. Doct. Eaſdale 199
Smith v. Craſhaw, Ward, and Ford 15
Smith *verſus* Trynder 22
Smith v. Wade 32
Smith v. Richardſon 33
Smith v. Aſhe 58
Smith v. Executors of Poyndrell 97
Smith v. Norfolk 225
Smith v. Hodgeskins 276
Mary Smiths Caſe 465
Smith v. Smith 410,421,425
Smith v. James 574
Smith v. Smith 507
Smith v. Cooker 512
Smith v. Rofley 529
Snape v. Norgate 167
Snape v. Turton 472
Sir Richard Snowd v. 321
Southley v. Price 247
Southold v. Daunſton 269
South and others v. Griffyth 481
Spalding v. Spalding 185
Sparrow v. Matterſock 319
Spirt v. Bence 368
Spencer v. Medbourn and his Wife 420
Spooner v. Day and Maſon 432
Sprig v. Rawlinſon 554
Stanford v. Cooper 102
Star v. *B*uckhold, 309
Stephens v. Potter 99
Stephens v. Facone 379
Stephens Caſe 566
Stephenſons Caſe 389
Stile v. Fynch 381
Stirlie v. Hill 283
. . . . v. Stringer 599
Stroud v. Hoskins 208
Stone v. Linger 467
Stone v. Newman 427,460
Stockman v. Hampton 441
Stonehouſe v. Corbet 381,400
Suttons Caſe 63
*S*wayn v. Rogers 32
*S*wayn v. *S*tephens 245,333
*S*wyft v. Eyres 546
*S*ymonds v. Mewdeſworth 193
*S*ir George *S*ymonds v. *S*ir Michael Green 308

*S*ymonds *verſus S*eabourn 225
*S*ydenham v. Parr 486
Doctor *S*ybthorps Caſe 417
*S*ydown v. Holm 422

T

Taylor *verſus* Page 116
Taylor v. *S*tarkey 192
Taylor v. Willis 219
Taylory v. Jackſon 513
Tankerſley v. Robinſon 163
Taverner v. *S*kingle 226
Terreys Caſe 564
Thorowgood and Jaques v. Collins 75
Thorsby v. Warren 159
Thornton v. Lyſter 514
Thorn v. *S*hering 586
Topſall v. Edwards 163
Townley v. Chaloner 312
Townſend v. Hunt 408
Tolſon v. Clerk 438
Tomlings v. *B*rett 517
Torles Caſe 582
Tredymmock v. Perryman 259
Tregmiell v. Reeve 437
Tregoſe v. Wennell 594
Turner v. Lee 471
Turner v. Palmer 74
Tutter v. Hundred de Dacorn 41
*S*ir Humphry Tufton and *S*ir John Aſhleys Caſe 144
Tyler v. Wall 228
Tyndails Caſe 252
Tyldens Caſe 264,291
Tyffyn v. Wingfield 325
Tyffin v. 426

V

Udall *verſus* Tyndall 28
Venables Caſe 10
Veſy v. Harrys 328
Vincent v. Leſney 18
Vivian v. Shipping 384

W

Walker *verſus* Riches 162
Walker v. *S*ir John Lamb 258
Ward v. Uncorn 216
Ward v. Pettiſer 362
Walſh v. *B*iſhop 239,243
Watts v. *B*aker 264
Waller and Petty v. *S*ands 274
*S*ir William Wallers Caſe 373
Watkinſon v. Turner 594
Weſtley v. Allen 94
Weſt v. Treude 187
Aquila Weeks Caſe 203
Wells v. *S*ome 240
Webb v. Nicholls 459
Whyte v. Ryſden 20
Whyte v. Hanby 525
Whytacres v. Hamkinſon 73
Whitmore v. Poretr 88
Windſor v. Hundred de Farnham 40
Wilcocks v. *B*radell 73
*S*ir William Withipoles Caſe 134,147
Wicks v. Shepheard 155
Wilſon v. Chambers 262
Wickham v. Enfeild 351
Wilkinſon v. Merryland 447, 449
Marqueſs of Wincheſters Caſe 504
*S*ir Henry Williams Caſe 595
Woolf v. Hole 91
Woolner v. Hold 489
Woolnoughs Caſe 552

Y

Yates *verſus S*ir John Dreydon &c. 589
Young v. Fowler 555
Young v. Young 86
Young v. Pride 89
Young v. Stowell 279

The

The second Table containeth the several abstracted Matters and Points of Law, which are controverted and resolved in the Book.

Abatement of Writs.

IN Trespass against *Baron* and *Feme*; because the *Baron* died betwixt the day of *Nisi prius* and the day *in Banco*, *pag.* 509
Because one of the Parceners or Joynt-tenants, Defendants, dyed, pendant the Writ, 574,583

Acceptance.

Where it shall take away title of Entry for a Forfeiture, 96,193,234
Of a Bond, or other Security, before the day due, or after, whether it dischargeth the Bond, 85,86
Vide tit. Leases.

Accompt.

What plea shall be in bar, and what in discharge of an Accompt, before Auditors, 116
Against one as Gardian in Socage, whether he ought to recite the Statute of *Marlbridge*, 229

Actions.

Actio moritur cum persona, how to be understood, 540
Where it shall be brought upon the privity of Contract, and where upon the privity of Estate, 183,184
Being transitory, it may be laid in any County, 444
Action upon the Case, for falsly procuring one to be endicted of Treason, 15,16,239
For laying Felony to ones charge, 277 286.
In matter of deceipt, where it lies, 141 142.
For misusing his Horse, 20
For rescuing one out of Execution, and whether it lies for the party Debtee, 107
For falsly causing money to be twice paid, 141,142
In nature of a conspiracy, whether it lies against one only, 239,271
How it should be brought, 286,315, 553,554.
For keeping a Dog used to bite sheep, 487
For keeping a Dog used to bite Hogs, which killed an Hog, 254
Against an Apparator, for falsly citing one, *ex officio*, into the Spiritual Court upon pretence of fame, 291
For stopping ancient lights in an house 325
For stopping a water-course, which ran to his Mill, 499,500,575
For erecting a Tallow-Furnace by a Chandler, to the annoyance of an Inn-keeper and his Guests, 510
Against the Bailiff of a Liberty, for suffering one, who was arrested at the Plaintiffs suit, to escape, 329,330

By an Executor againſt the Sheriff, for not returning a Writ executed *in vita Teſtatoris*, 297
Whether it lies for a Commoner againſt his Lord or any other, who erects a Warren in the Land adjoyning, and with Conies eat up the Common, 387,388
For diſturbance of a Commoner by Encloſure, 432
Whether it lies in nature of a *Valore Maritagij*, 502,503
For an Hawk, 544,545
Whether it lies againſt Tenant at will for waſte done, 187
Whether it lies by *Baron* and *Feme*, for wrong done to the Eſtate of the *Feme* during coverture, 438
Action of *Trover & Converſion*, whether it lies for money out of a bag, 89
Whether it lies of a Bond. What ſhall be ſaid a converſion thereof: And whether the date thereof ought to be ſhewn 262,554,545
Whether it lies for the Leſſor, if he grant over, *&c.* againſt a Stranger, or the Leſſee himſelf, for cutting and carrying away Timber-trees, during the Leaſe for years, 242
Whether it lies by the Leſſee for life, for cutting the Loppings, which were reſerved to the Leſſee, upon excepting the Trees to the Leſſor, 437,438
Whether *Trover & Converſion* of Timber-trees lies for the Bargainee of him in Reverſion during the Eſtate for life, being felled and carried away by Tenant for life, or his Grantee, 274
Whether *Trover & Converſion* lies for Cattel put to Paſture at a weekly ſum, which are detained for not paying the paſturage, 271
Trover againſt *Baron* and *Feme* upon *Trover* and *Converſion*, of Goods to the uſe of them 494,495
Whether an Action of *Trover & Converſion* is within the Statute of 21 *Jac. of Limitations*, 333
Action of Treſpaſs upon the Caſe, *Quod vi & armis cepit & chaſeavit* his Cattel into the Cloſſe of *J. S.* for which, being damage feſant, he paid 40 s. for amends to the ſaid *J. S.* 325
Action upon the Statutes of Hue and Cry, how they ſhall be brought, 211,212,213
Whether a Writ of Error lies upon that Action, 142
Action upon the Statute of Maintenance, 232
Upon the Statute of *Scandalum Magnatum*, 135,136
Action upon the Caſe for words: If the words be uncertain, it lies not, 283
For words ſpoken at two ſeveral days, if damages be intirely given, and the words ſpoken at one time be not actionable, how Judgment ſhall be given, 237,327,328
Whether it lies for ſaying *J. S.* is the reputed father of ſuch a baſtard 436
Suſpicion is no good cauſe to juſtifie the ſpeaking of ſlandrous words, 52
For words ſlandring ones title 140 141,469
Special prejudice muſt be therein alledged, 141,469
It is not within the Statute of 21 *Jac. of Limitations*, 141
For words in ſcandal to his Place or Office, 14,15,40,192,223,229,261 459,460,510,563.
For words ſcandalizing his trade or living, 31, 211, 236, 237, 265, 270, 282, 317, 319, 382, 472, 515, 516, 570.
For words, whereby loſs of life or corporal puniſhment would enſue, 52, 92, 135, 140, 163, 177, 236, 268, 269, 277, 282, 283, 288, 307, 318, 320, 321, 322, 324, 326, 327, 328, 329, 337, 378, 417, 474, 475, 480, 489, 509, 510, 512, 553, 572.
For defamation and words of incontinency, 110, 155, 229, 261, 269, 285 309, 322, 339, 356, 393, 404, 436, 456, 457, 466, 486, 487.

Adjournment.

How the adjournment of the Term, or any the Returns thereof, is to be made, 11,12,27,200,460,466
What day ſhall be the firſt day of the Juſtices ſitting, after the adjournment, 200

Admi-

Administration and Administrators.

To whom it shall be committed, 8,9, 106
Whether it belongs to the Husband after the Wifes death, 106
Where it shall be said to be granted generally, and where specially, 94
Where an Administrator shall pay costs, 219
Administrator sued in the Spiritual Court, to make distribution of goods after debts and legacies paid, shall have a Prohibition, 62,63,201 202.
Whether an Administrator may have a *Liberate* upon an Extent sued by the Executor of the Intestate, who died before the Extent returned, and the *Liberate* sued, 451,452, 457,458,459
Administrator *durante minore ætate*, bringing an Action, needs not shew, That the other is *infra ætatem* 17 *annorum*, 240
Administrator *durante minore ætate*, where his power determines, 516
Vide tit. Executors.

Admiraltie.

Resolutions upon the Case of Admiralty Jurisdiction, 296,297,603

Ad quod Damnum.

Sued for stopping an High-way, and how to be prosecuted, 266,267

Alien and Denisen

Alien may be Administrator, and take Administration of Leases, as well as of personal things, 8,9
The Father a Merchant living beyond Seas, his Child born there shall be a Denisen, though the Mother be an Alien, 601, 602

Amendment of Writs and Records.

Where it shall be of an Original Writ, and in what manner, 74
After issue, 86,92,144,145,148,203, 204,278.
Of a Record after Verdict upon the misprision of the *Habeas Corpora*, 32
Of Records after Writ of Error brought, 86,95,574
Of the name of a Juror, whether it may be by the Statute of 21 *Jac.* 203,564
Of the *Nisi prius* Roll after Verdict, where the entry of the *Nisi prius* Roll was *in placito Transgressionis*, and the Plea and Issue were *in placito debiti*, 274,275
Of the Record of a *Postea*, Whether it may be after the return thereof, 338
In point of Judgment, and after certificate thereof, upon a Writ of Error allowed, 410
Upon misprision of the Clerk, after Writ of Error brought, 574,594, 595
The Issue Roll may be amended by the Imparlance Roll, but not *e converso*, 46,92
A Record of *Quo Warranto*, amended two or three years after the entry, 144
Where it is the defalt of the Clerk in judicial Proces, there shall be amendment, 38

Amercements.

Where the Amercement of the Plaintiff ought to be several, and where but one 178
An Infant ought not to be amerced, 410
Whether for amercements in Leets and Court Barons, upon a distress, damages and costs ought to be given to the Avowant, 534,535
Of a Clerk for altering a Record, 278
How amercements in the Sheriffs turn ought to be estreated & levied, 275

Annuity.

Whether it be a real or personal Action, 171
Whether an Annuity for life granted to exercise the Office of Steward or Park-keeper, shall be determined by the determination of the Office

fice, 59,60
Whether an Annuity may be demanded by Bill, 171,172
How the Judgment in a Writ of Annuity shall be for the principal and arrearages; and how it shall be where it is against the heir, 436,437

Appeal.

Whether it may be brought in the next English County for a Murder in Wales, 247,248
Of an Order or Sentence from one Place or Court to another, which is there confirm'd or revers'd. The Order is made peremptory, 350,351
Appeal by the son and heir against his Mother, for the death of his Father, and Judgment thereupon, 531,532

Appendant, Parcel, &c.

Where a new-building by incroachment upon the Lords waste, was adjoyned to an ancient Messuage *anno* 33 *Eliz.* And in 19 *Jac.* the said Messuage, *cum pertinentiis*, was demised for years; The said new purpresture not being found to have been used together with the house, passed not by the words *cum pertinentiis, &c.* 17,18,169
Whether Land lying in *D.* four miles distant from the Messuage of *J.S.* in *S.* yet always used and occupied with the said Messuage shall pass in a Devise of the said Messuage, *cum omnibus & singulis pertinentiis, &c.* 57
Whether Land may be said to be appertaining to an house in the Kings case, where it hath been let and occupied together with it, 169

Arbitrament.

What shall be good, 216,217,226, 263,383,433,434,541.
To pay money at a Strangers house, whether it be a good Arbitrament, 226
At what time the nomination of an Umpire may be appointed, if the Arbitrators cannot agree, 263
Submission to Arbitrament by several Bonds, where it shall be said but one submission, 433,434

Assets.

How the Plaintiff shall have Judgment upon Assets found, 373
Whether it shall be Assets by discent, where the father deviseth his Land to his son and heir, upon condition that he shall pay his Debts, &c. 17, 18,161

Assigns.

Whether an Assignee in trust with others, shall be charged by the receipt of his companions, or only upon his own receipt, 312
Of what Covenants an Assignee of a term shall take advantage by the Common Law, or by the Statute of 32 H. 8. 25. 137,503,580
How the Assignee of a Reversion shall bring Covenant against Lessee for years, 285
Whether an Assignee of an Estate, to which a future use and contingent Estate is annexed, may have benefit of the contingent use, 358,359
Assignee of a Rent: with what Covenants chargeable, 24,25,221,222
Assignee of a Reversion, of what Covenants he shall take advantage, 137

Assise.

Of what things it lies, 555
Of Darraign presentment, 341
Of a Rent, 507,508,520,521
Where an Assise of Mortdauncester lies of Land demisable, 563

Assumpsit 384, 345.

What shall be said a good consideration in an Assumpsit, 19570,77
It lies not being grounded upon a personal promise in a real Contract, if the real contract be executed, 415
Damages recovered in an Assumpsit cannot be a bar to a Debt upon a record or specialty, 6
In an Assumpsit to pay a Debt, the Plaintiff

Plaintiff muſt ſhew the cauſe of the Debt: But not ſo upon an Accompt, 116

Whether it lies for Rent upon a Leaſe for years, upon a general *Indebitatus*, 343

In conſideration that he ſhall make a Leaſe for years, a Leaſe is made for years, rendring Rent: If an Aſſumpſit lies for the Rent arrear, 415

Whether it lies preſently, where the Contract is to pay at ſeveral days, and makes a failer at the firſt, 241, 350.

Whether one may plead in diſcharge thereof, without ſhewing how, 384

Upon conſideration paſt is good, if it be upon the Defendants requeſt, 409

To pay *tantum quantum meruit* for ſuch a thing, or for doing ſuch an act, where it ſhall be good, 77,573

To forbear a Debt *per pauſulum tempus*, whether it be good, *&c.* 241

To forbear a Debt *aliquo tempore*, and he alledges that he forbore for a year, If it be good 409,438

To pay money upon a Symoniacal Contract 337,353,361

To pay money upon Intereſt, &c. 272, 273.

In conſideration that he ſhould deliver a general acquittance. He alledgeth that he delivered a general acquittance to a ſtranger, to the uſe of the party, 19

In conſideration, that they ſhall accompt together. And the Defendant, being found in arrearages, promiſed to pay, 116

Aſſumpſit to pay for wedding Apparel, to what apparel it ſhall extend, 53

To give ſo much in marriage with his daughter, as he gave with any other daughter, How to be expounded, 186

Firmum facere to ſuch a woman ſuch a Portion; whether it amounts to a warranting of ſo much, &c. 202

To pay ſo many French pieces, whether they be to be intended French Crowns, 194,195

Vide 384,385. *& in tit. Conſideration and Time.*

Attainder.

In a Premunire, how it ſhall relate, 172

Attaint lies in a Writ of Enquiry of waſte, 414

Atturney.

What Priviledges he hath, 11,389

How puniſhed for dealing falſly in his place, 74

Whether he ſhall have an action of Debt for ſums which he laid out, as Solicitor, in another Court, wherein he is not Atturney, 160

For what ſums laid out by him he ſhall be allowed, 107,159,160

Whether he ſhall maintain an Action for calling him Common Barrettor 192

Vid. in tit. Fines aſſeſſed, and Priviledges.

Attornment.

Whether Attornment to the Grant of a Reverſion may be by words of aſſent thereto, ſpoken to a meer ſtranger, and what ſhall be a good attornment, 440,441

Audita Querela.

What ſhall be a good ſurmiſe in an *Audita Querela*, 153,214

Againſt whom it ſhall be brought, where one recovers Debt and aſſigns the Extent over, and afterwards releaſeth all Judgments and Executions 214

Upon a Judgment in Treſpaſs by two, ſurmiſing that a third perſon was party to the Treſpaſs, and after the Judgment, had made ſatisfaction for the ſame, 443,444

By three; where Judgment is againſt all three, and one is only taken in Execution, Whether the two who were not taken in Execution may joyn with him, 443

Averment.

When it may againſt the words of a Deed, 501

Where it ought to be specially pleaded, 61
Where a general Averment shall be allowed, 542,543
That a recovery against *J. S.* for Trespass of Battery in one County and against *J. N.* for Trespass of Battery in another County, is one and the same Trespass, 444

Ancient Demeasn.

Whether it may be pleaded after Imparlance, 9
Custome there, that the Lands are descendable to the eldest daughter, 484

Avowry.

For part of a Rent, and shews not how he is satisfied of the residue, is ill, 104
Whether in an Avowry for an Hariot, the Avowant ought to shew the kind of beast and the price thereof, 260.
Where costs and damages shall be allowed in an Avowry, 497, 532, 533 534, 535.

Authority.

When it shall be said to be pursued, 213
What shall be Authority to an Executor, to sell after the death of Tenant for life; and whether a surviving Executor may sell, 382

Award, vide Arbitrament.

Bankrupt.

WHat interest he hath in Goods extended before the *Liberate*, 149, 166, 176, 177
How a Debt due to a Bankrupt by simple Contract, and assigned to a Creditor by the Commissioners, shall be recovered 187, 209
Whether an Inn-keeper be within the Statute of Bankrupts, 549, 550
Whether a Shoemaker be within the said Statute, 31
Vide tit. Bargain and Sale, and Copyhold.

Bargain and Sale.

Were, by Custome, Copyholder in Fee dying seized, his wife is to have it during her life: And he becoming Bankrupt, the Commissioners, by Indenture inrolled, bargains and sells the said Land: The *Baron* dies, the *Feme* is admitted, and afterwards the Bargainee admitted; whether the Estate vested in the Bargainee before admittance, 568, 569.

Baron or Peer. Vide Peer.

Baron of the Exchequer. Vide Judges.

Baron & Feme.

Where they ought to joyn in Actions, 419, 437, 438, 505, 554, 594
Where they ought to be sued joyntly, 254, 417
Where he shall have the sole Action for beating his wife, 90, 91, 175
Baron and *Feme* are sued to outlawry, and before the outlawry the *Baron* or the *Feme* appear: what shall be done, and how the apparance shall be entred, 58, 59
Baron and *Feme* Administratrix, recover debt and damages: The *Feme* dies: The *Baron* shall not have *Scire facias*, 208, 227, 228, 464
Baron and *Feme* Executrix, how the Judgment shall be upon a *Devastavit* of the *Feme*, 519, 526
Baron releaseth the Suit of his *Feme*, for Defamation, in the Spiritual Court. It is a good release *quoad* the costs, but not *quoad* the Defamation, 222
Baron sued by his *Feme* in the Spiritual Court, inforced to pay his wifes costs in Suit against himself, 16
Baron and *Feme* sued in Trespass; the *Baron* dies betwixt the day of *Nisi prius* and day *in Banco*: whether Judgment shall be entred against the *Feme* 509
Baron and *Feme* sued in Trespass; The *Baron* is acquitted: whether the Judgment shall be against both *quoad*

quod capiantur, 406,407,513
Baron Copiholder in right of his *Feme*, forfeits it: whether the *Feme* and her heirs, after the death of the *Baron*, shall be bound thereby, 7
Baron seized in fee, makes feoffment to the use of himself and *Feme*, and to the heirs of the Survivor of them; and afterward makes a feoffment of the same Land, and dies: the *Feme* enters: The feoffment of the *Baron* hath destroyed the contingent use of the Fee, 102
Baron and *Feme*, Joyntenants in Fee by purchase, during the coverture: The *Baron* sole makes a Lease for 21 years by Indenture, rendring the ancient rent, and dies: Whether it shall bind the *Feme*, 22,23
Baron possessed of a Lease for years, he and his *Feme* joyn in a Lease, rendring rent to them and the Survivor of them: Whether the rent be good to the *Feme*, 288,289,290
Feme. Tenant for life of an Hop-ground, dies immediately before their gathering, The *Baron* shall have them, 515
Whether the *Baron* may devise the wearing Jewels of his *Feme*, 343, 344,345,346.
They cannot be joyntly charged for converting goods to their own use, 254,494,495
Vide tit. Feme.

Baronet.

Whether it be a name of dignity, and within the intention of the Statute of 1 *Ed.*6. *cap.*4, 104,371,372

Barrettor.

Action brought by an Atturney, for calling him common Barretter, 192
Endictments for Barrettry, 340,348

Bar to Actions.

Bar certain to common intendment is good, 6,195
If a Replication be not good, yet if the bar be ill in substance, Judgment shall be for the Plaintiff, 5
Being pleaded at large, where it may be answered by Replication at large 384
In an Action of *Trover* for goods; That he recovered in Trespass for the same goods, 35,36
Pleaded in Debt upon an Obligation, although it answers not precisely to the condition, yet where good, 195

Bastard.

Who shall be accounted the reputed father, 341,350,351,470
How he shall be provided for by the Parish, or reputed father, by the Statutes of 18 *Eliz.* and 3 *Carol.* 341,350,351,436,470,471

Battail.

Battail gaged in a Writ of Right, 522

Bayle.

Falsly offered and insufficient, how to be punished, 146
Bayle sufficient tendred to a Sergeant, who by one was arrested upon a Plaint in *London*; whether the Sergeant be bound to accept thereof: And what remedy for the party, if he should refuse, 196
Bayle granted upon *Habeas Corpus*, 507,552,558
Writ of Error brought by the Bayle, for a Judgment given against the Principal, 562
Where a *Capias* is sued against the Bail, and he taken in Execution, without any *Scire facias* sued against him, it shall be Error, 562
Writ of Error brought by the Principal and Bail, for an Error in the principal Judgment, and execution against the Bail; and therefore abated, 408,574,575
Bail in the Kings Bench, how it differs from Bail in the Common Pleas, 481

Bailiff of Liberties.

Whether he may make an Extent upon an *Elegit*, & deliver the moiety, 319

Where he ſhall juſtifie and excuſe, where the Sheriff himſelf cannot, 446,447

Bill of Exceptions.

Where and when a Bill of Exception ſhall be for not admitting Evidence; and what ſhall be done thereupon, 342

Bill of Review.

Where it cannot lie, 40,312,351

Bis petitum.

Where aided after Verdict, 301

Biſhop.

What Grants or Leaſes of Biſhops ſhall bind their Succeſſors, 16,17,47,48, 49,50,256,258,279,557.
Of an ancient Office, with an addition of a new Fee which is confirmed; whether it ſhall bind the Succeſſor for any part, 47,48,49,50,279,557
May grant Letters of Inſtitution under any Seal, and out of his Dioceſs, 342
His Certificate of accouplement in loyal Matrimony, 351,352

Brewers.

Whether they may be ſaid to be Victualers within the Statute of 21 *H.*8. 113
Whether Brewers and Bakers be within the Statute of 5 *Eliz.* for uſing a Trade, &c. 499

Brueria, what, 179.

Burning of houſes.

Where it is felony, and where not, 337,338

Burrough Engliſh.

The Cuſtom thereof expounded, 411, 412,413.

Bylaw.

What, and whom it ſhall bind, 498

Capias.

IT cannot be awarded againſt the Principal, without ſuing *Scire facias* againſt the Bail,
Where Judgment ſhall be *ideo capiatur*, 178,340,406,407
Capias omitted in an Endictment of Recuſancy; and therefore erroneous 505

Certificate.

De Accouple in loyal Matrimony, how to be made, 351
Of one being beyond Seas, under the Seal of the Town where he was reſident, without oath, for the truth thereof, and one ſworn for the expoſition thereof, is not allowable, 365

Cerciorari.

Where it may be awarded to certifie another *Cerciorari*, 91
Where it may be to certifie an original, where an original is alledged to be certified, 91,410
To remove an Endictment of Felony out of the Cinque Ports, how to be directed, 252,253,264,265,291
To remove a Record out of the Kings Bench into the Chancery, whether allowable, 297,298
Whether it may be directed into *Wales* to remove an Endictment from thence, 331,332

Chancery.

How ſaid to be always open, 3
Its Juriſdiction, 190,191
Whether it can give relief againſt Dower, 191
Whether a Decree in Chancery ſhall not be re-examined upon Bill of review, 40,312
The proceedings there, upon a Statute Staple

Staple, 451,452,458,459

Cheaters.

With false Dice, how to be used, 234
Judgment against one for cheating with false Tokens, 564

Churchwardens.

Elected by the Parish, and not by the Parson, 589
Writ awarded to the Ecclesiastical Court, for admitting him to his Office, 589
Where they shall have double costs in Suits against them, 175,285,467

Cinque-ports.

Their Liberties, 247,252,253,291
How Writs ought to be directed thither, 252,253,264,265,291

Clergy.

Where it shall be taken away from one who robs a Chamber in an Inns of Court, no person being in the said Chamber, but in other parts of the house, 473,474.
If the Principal prays his Clergy, and hath allowance thereof, the Accessory is to be discharged without being put to his book, 566.567.

Collusion, Covin, or Fraud.

Where it shall be intended without being found, 483.484.
Where it shall not be intended unless expressly found, 550.551.

Commission and Commissioners.

Commission in the time of one King executed in the time of another before notice; Whether it be not determined, and to what purpose it shall be good, 97.98.99.
Commissioners for Ecclesiastical matters, how, and in what cases they ought to proceed, by Fine or imprisonment, 113.114.220.
Vid. Court Ecclesiastical.

Common and Commoner.

Whether a Commoner may kill Conies eating up his Common, 387, 388.
Common granted *ubicunque & quandocunque averia sua fuerint*; What passeth thereby, 599
Common appendant cannot be severed from the Soil by Grant, 542
Common appurtenant to a Manor, being certain, may be annexed to parcel of the Manor, or may be severed from it, 432
Whether common appurtenant may be created by Deed within time of memory, and whether it may be divided, 482
Common granted to one in his Manor and Lands of *D.* The Grantee may claim Common in any part of the Manor, 599
None may intitle himself to any profit *a prender in alieno Solo*, without Grant or Prescription, 542

Common Recovery.

Against the King, not good, 96
By an Infant, how good, 307
Vide tit. Recovery.

Conditions.

What words shall make a Condition, 128,129,455,456
The performance of a Condition precedent ought to be averred, 195, 381.
Condition of an Obligation to enjoy such Lands; whether the Obligor is to warrant it against unlawful Titles, 5
Condition to surrender upon forfeiture of payment of money at a day certain: The money is paid before the day, Whether it be a good performance, 284
Upon an Obligation to perform all Covenants, Payments and Agreements in a Lease; whether the Obligor ought to pay the rent without demand, 76,77
Lessee for one and twenty years, upon con-

condition that he shall not alien any part above three years, during the term; if otherwise, the Lease to be void: Who lets for three years, and so from three years to three years, during the term of his life, if he lived so long: Whether this were a breach of the Condition, 511, 512

Confess and avoid.

Where one of the parties claim by a later Grant from one and the same party, there needs not any confession and avoiding his title, 581
What shall be a good confession and avoidance in a Plea; and where it shall be good without Traverse, and where not, 325, 494

Confirmation.

Where it may inlarge an Estate, or make an Estate in *esse*, which was barred by a fine, 478, 479
Of a Lease by a Parson made in 9 *Eliz.* the confirmation being in 14 *Eliz.* by another Patron and Ordinary, then were at the time of the Lease made, yet good, 38

Considerations.

In an Assumpsit, 8, 19, 20, 178, 272, 273, 409.
To raise uses, 529
To forbear *paululum tempus*, 241
Vide tit. Assumpsit.

Consultation.

Granted for the probate of a Will *Quoad Bona*, where the will is made of Lands and Goods, 165, 166, 391, 395.
Whether it shall be granted without motion, if the Defendant answer not to the Prohibition, 238, 239
Vide Prohibition.

Copyhold and Copyholder.

How a Copyhold Estate shall be pleaded, 190
What shall be said to be a reasonable fine for a Copyholder to pay upon his admittance, 196
A Copyholder by the Common Law without special Custome, cannot make a Lease for one year; but it is a forfeiture, 233, 234
Whether Copyholds be within the Statute of *Donis conditionalibus*, 42, 43, 44, 45.
Whether Copyhold be liable to the Statute of Bankrupts, 549, 550, 568 569.
Copyholder by license lets it by Indenture, with divers Covenants; and afterwards surrenders to the use of another: Whether his Assignee shall have benefit of the Covenant, 24, 25
Copyholder for life surrenders to the use of another; and the Lord accepts, and grants it to *Cesty que use* for his life: He dies: Whether the first Copyholder shall re-have it, 205
Copyholder surrenders out of Court; In whom the interest rests, until he be presented and admitted, 273, 283, 569, 570.
Copyholder surrenders twenty acres into the Tenants hands, according to agreement upon condition, to be void, &c. And before the time prefixed, he surrenders one of the twenty acres to another, and afterwards performs the condition; Whether this second surrender be good, 273, 274, 283, 284
Copyhold surrenders to the use of one out of Court, upon condition to be void; and afterwards before the condition performed, surrenders to the use of another; The condition is perform'd; the second surrender is presented, & the party admitted, the first never being presented: whether it be good, 273, 274, 283, 284
Lord of a Manor makes a Lease thereof, and of a Copyhold therein, by the name of such a Tenement: Whether the Copyhold be not determined, 521
Copyholder for life claims a Custome to cut down and sell trees, &c. 220, 221.
Vide plus in tit. Surrender.

Coroners.

Coroners.

Coroners Inqueſt of what perſons it ought to be taken, 134
Where a Writ awarded to the Coroners, where the Sheriff is Plaintiff or Defendant, be error, 345,346

Corporations.

What Acts they may do without Deed, 160
Where the miſnaming of a Corporation ſhall make a Deed or Record ill, 160,572, 574

Coſts and Damages.

Whether they may be aſſeſſed without Verdict, 582
Where after ſpecial Verdict the Plaintiff diſcontinued: whether the Defendant ſhall have coſts, 575
Where coſts and damages ſhall be allowed to Avowants, 497, 533, 534, 535.
Where they ſhall be againſt an Adminiſtrator, or an Executor nonſuted, 29, 219
The Defendant ſhall have coſts, where the Declaration is ill, 175
Coſts given *pro dilatione Executionis* in a Writ of Error, 401
Coſts releaſed in the Spiritual Court by the *Baron* for the defamation of his *Feme*, 222
Coſts paid in the Spiritual Court by the *Baron* for his *Feme*, upon his *Femes* ſuing him there, 16
Where they ſhall be diſcharged by the general Pardon, upon a Sentence in the Spiritual Court for Defamation, and where not, 46, 47, 114
Where double coſts ſhall be upon a falſe Suit againſt Churchwardens and other Officers, 175, 285, 286
Attaint brought by the Plaintiff upon an Action of Battery, which had paſſed againſt him, and now the firſt Verdict was affirmed: whether by the Statutes of 21 & 23 *H.* 8. the Defendant ſhall have any more coſts, 542

Covenant.

By what words made, and how to be conſtrued, 128, 129, 207
Where the word [*Provided*] in an Indenture ſhall make a Covenant, and where a Condition, 128, 129
In Covenant one may aſſign ſeveral breaches; but not in Debt upon an Obligation, for performance of Covenants, 176
The breach of a Covenant being in the time of an Aſſignee, and an Action brought by him, The Covenantee cannot releaſe this Action, 503
Whether a Covenant ſhall bind an Infant to be an Apprentice, 179
Where Covenants in Deeds ſhall be ſaid to be diſtinct by themſelves; and where they ſhall relate and be expounded by precedent Covenants, 107
How Action of Covenant may be brought by an Aſſignee, for not repairing an houſe; and what ſhall be ſaid to be a breach thereof, 24, 25
Brought againſt an Aſſignee or Grantee, 188, 221, 222
Whether it lies againſt the Leſſee, where he hath aſſigned over his Eſtate, and the Aſſignee is accepted for Tenant, 188, 221, 580
Made by an Aſſignee of a term for life, and by him in Reverſion: whether the Action ſhall be brought as Aſſignee of both, or of him who hath the Inheritance, 285
Covenant to make ſurrender of a Copyhold upon requeſt, 299
That Land ſhall be of ſuch value yearly, and that he will ſtand ſeized, *Jones*, 360

Covin, Vide Colluſion.

Counſel.

Aſſigned to one arraigned for Felony, 147, 365, 483
What matters they may plead and give in evidence, 365
Where a perſon indicted ſhews any exception in Law, any one not aſſigned may be of counſel for him, 147

Couns

Counts and Declarations.
Vid. tit. Declaration.

Courts.

The Cuſtoms and Preſidents in every Court, are the Laws of the Court, 527,528
Of what Cuſtoms the Courts are bound to take conuſance, without ſpecial pleading, 562
The Court ſhall not take conuſance of any errors upon the Record, unleſs they be aſſigned, 53
Where title appears for the King; whether the Court is bound, *ex Officio*, to award for him, 590, 592
Of Star Chamber, its foundation and Juriſdiction, 168,531
To what purpoſe Sentences there ſhall bind, 56,65
Court of Chancery. *Vide* Chancery,
Court of Kings Bench.
Its power, 182,209,210,330
Iſſue being joyned in Chancery and the Record delivered into the Kings Bench, may be well tried by *Niſi prius* out of the Kings Bench, 313
Court of the Common Pleas.
Its priviledges for the Serjeants and Officers thereof, 11,84,85
Different manner of proceedings betwixt the Kings Bench and Common Pleas, 481,528
Its ancient Juriſdiction in granting Prohibitions to Court Chriſtian, where they proceed in prejudice to the Common Law, 88
Court of the Exchequer,
May demiſe as well for life as for years the Kings Lands, under the Exchequer Seal, 513
Vide tit. Offices by Inquiſition.
Court of the Exchequer Chamber.
Of what antiquity, 514
Whether an Error in Deed is aſſignable in the Exchequer Chamber, 514
In what caſes Writs of Error lie in the Exchequer Chamber, 142,286,300, 464.
Vide tit. Judges.
Court Eccleſiaſtical.
Whether they may deprive any of his Office which he hath for life, 65
Of High-Commiſſion.
Its power, 113, 114,220,582
How fines impoſed are to be levied, 579
Court of Requeſts, 595,596
Court of Marſhalſey, 318,571
Court of the Stanneries in *Cornwall.*
Their manner of proceeding, 333
Court of the Marches of *Wales.*
Its Inſtitution and Juriſdiction, 309, 531,557,558,595.
Court of the Admiralty, 296,297,603
County Court, Turn of the Sheriff, and Court Leet, *Vide Leet & Turn de Vicount.*
Court of Pypowders.
Where it ought to be held, and for what matters and contracts in Markets and Fairs, 45,46
Court Baron.
Where the Courts of ſeveral Mannors may be held at one place; and how they ſhall be good, and where not, 367
Vide Amercement.
Where inferiour Courts in pleading ought to ſhew their authority and creation, 46
They cannot allow protections, *Ley Gager, &c.* 112,146
A *Superſedeas* awarded to an inferiour Court, becauſe an Utter-bariſter was not Steward, 79

Cum pertinentiis. Vide Appurtenances.

Cuſtome.

How to be pleaded, 347
What ſhall be good, 65, 196,259,260
The Cuſtomes and Preſidents of the Courts, are the Law in all Courts, 527,528
Of what Cuſtomes Courts are bound to take cogniſance, without ſpecial pleading, 563
Several Cuſtomes for the payment of Tythes, 113,237,339,403,404
Cuſtome to grant a Freehold by Copy; whether it be good, 200
Cuſtome of Burrough Engliſh, how it ſhall be conſtrued, 411,412
Cuſtome, That every one ſhall be Conſtable in ſuch a Village according to their habitations: Whether it ſhall bind

bind a priviledged person, 389, 585
Custome amongst Merchants upon Bills of Exchange: what shall be good, and what remedy for non-performance, 301, 302
That a *Feme covert* in *London* shall be sued without her husband, how to be expounded, 68, 69
Custome in *London* to arrest upon Pleint entred in the Counter, without any other warrant; If good, and whether the Serjeant ought to take Bail, 196
Where a Custom in *London* may be against a Statute, 347, 361

Curriers.

What Leather they may sell uncut, and to whom, 588, 589

Damages.

Where they ought to be intirely given, and where not, 20, 21, 186, 414.
Intire, for words spoken at several times, 236, 237
Where damages found against one Defendant shall bind the other, 54, 55, 192, 193.
Where they may be severally given against Defendants, and shall be recovered accordingly against them: And where the Plaintiff ought to have but damages of one only, 54, 55, 243.
Recovered in an Assumpsit, cannot be a bar to a Debt upon a Record or specialty, 6
Where conditional damages may be given by the Jury, 32, 33, 143
Whether they shall be inquired by the same Jury, where a demurrer is upon the evidence, or shall be inquired of after Judgment by a Writ of Inquiry, 143
Damages awarded in a Writ of Error upon Judgment affirmed, according to the loss which the party sustained by not having his Execution, 145
Where damages and costs shall be assessed or increased by the Court, 175, 561
Whether treble damages may be given by a Justice of Peace upon the Stat. of 23 *H. 6. of Extortion*, 438, 448
Where a penalty is given by a Statute, there ought not to be any more given for costs or damages, 560
Where a Statute gives a penalty certain, and gives an action of Debt; If the Defendant doth not pay it, but inforceth the party to Suit, he shall recover his damages due by the Statute upon demand, and his costs also, 560
Vide tit. Costs.

Darraign presentment. Vide Assise.

Daughter.

A Daughter performs the Condition to pay money upon a Mortgage; a Son is born after: whether the Daughter may retain or the Son may *oust* her, 87
Custome in ancient Demeasn, that Lands are descendable to the eldest Daughter, 484

Day.

No day shall be given to a Defendant against whom a Verdict is found, 236
Feme sole recovers in an Action, and before day *in Banco* takes husband; she notwithstanding shall have Judgment, 232
Whether it may be given against one Defendant upon Verdict, where day is given unto the other until the next Term upon demurrer, 235, 236
Where it may be given until the next Court, without mentioning a day certain, 254
How Acts done in Term time, shall relate to the first day of the Term, 102
How the days in Term shall be reckoned, and to what purpose, 13
Quarto die post of the Return, is properly the day for sitting, and not before, 14, 102
Idem dies shall not be given to any who make default, 341

Death.

Whether the death of one of the Defendants before Judicial Proceſs awarded becauſe of Error, 426,574
Whether, when one ſues a Judicial Writ and dies, it being ſerved by the Sheriff and returned afterwards, be good, 450,451,452,458,459
Vide tit. Abatement of Writs.

Decem Tales. Vide Tales.

Declaration and Counts.

Where they ought to ſhew the beginning of the particular Eſtate, 571
Where it is but conveyance to the Action, it needs not be ſo preciſe as in a Plea, 139
Whether it be good, although not warranted by the original Writ, 272,281,282,327
Declaration ill, becauſe it therein appears that the Action was brought before there was any cauſe of Action, 575
Where it needs not be filed, 532
Where it ſhall be made good by the Plea in bar, 288
Where, being incertain, it is made good by the Verdict, 420, 497,531
Where it ſhall be good if it hath ſufficient ſubſtance, although it be not according to the uſual form, 209
Not good if by way of recital only, and not direct affirmative, 553
Whether in Covenant it may be *per Teſtatum exiſtit*, 188
Whether in the Annuity for life, it ought to be in *Dominico ſuo ut de feodo*, 186
Whether in an *Eject. firmæ* it be good, although it wants *vi & armis*, 407
Whether in Treſpaſs *vi & armis*, and not ſaying *contra pacem*, it be good, 325
Whether in Debt upon an Obligation, and doth not ſay, *Quod per Scriptum Obligatorium conceſſit*, it be good, 209
Where in an *Audita Querela*, although vitious, it ſhall be good, if the Writ comprehend matter ſufficient, 153
Where it ought to have preciſe certainty, 507,443,497
In an *Ejectione firmæ* of an hundred acres of Bogg *in territoriis de* Ireland, 511,512
De Piſcaria in *Ireland*, 492
In an Action upon the Caſe, for ſtopping a Water-courſe, 499,500
Vide tit. Error & Judgment.

Deeds.

How they ought to be expounded, 230,386,417,548
To what time a Deed ſhall relate, being delivered by three at one time, and by a fourth at another, 263
If raiſed by the party himſelf after delivery; whether the intereſt thereby conveyed be as well determined as the Deed it ſelf, 399
Whether if pleaded and miſrecited in ſubſtance it be ill, 426,427
Vide tit. Grants, & Monſtrans de faits.

Default.

Where the default of one Defendant ſhall prejudice the other, 251
After default, the Iſſue and pleading are out of the Court, 517

Defence.

How it ought to be made in a Writ of Right, 310,311

Demand.

Of Rent, how, and at what time it ought to be, 76,77
Of a Rent-Seck, where it ſhall be made, 508,521
Vide plus in Requeſt.

Demiſe de Roy.

What Acts ſhall be determined by the Kings Demiſe; and what ſhall ſtand good until notice, &c. 13,297,98
Whether it ſhall abate or diſcontinue original Writs, upon a penal Act brought by the Informer, for the King and himſelf, 10,11

Demurrer.

Where a general Demurrer may be without shewing cause by the Defendant in the conclusion of the Plea, *viz. & hoc petit, &c.* or *de hoc ponit, &c.* 162
Where there is a demurrer upon Evidence, the Jury ought to be discharged without more enquiry, 143
A Demurrer cannot be waved without the consent of him who demurred, 513

Departure in Pleading.

What shall be said to be so, 76, 77, 228 229, 246, 257.

Deputy.

Deputy is allowable in ministerial Offices, 557
If he misdemean himself, it is a forfeiture, 557
Who ought to approve of the sufficiency of a Deputy, 557

De son tort demesn.

Where it shall be to the Issue, 138
The party himself shall not take advantage thereby, 240, 255

Debt, Debtor, &c.

whether it lies for waste, where one is obliged to perform all Covenants and Payments in an Indenture of Lease, 76, 77
Debt upon a simple Contract lies not against an Executor or Administrator, 187
It lies not for an Attorney against him who retained him to prosecute for another, 193, 194.
Brought against the Executors of a Sheriff for money received by their Testator, upon an Execution, 539, 540.
Upon a Lease for years, Whether it may be brought by the Assignee of the reversion in another County, then where the Land lies, 143, 183
Against one as heir to his brother, and it was found that he had the Land, as heir to his Nephew, 151
Upon a Contract assigned by commission of Bankrupts; The Debtor dies: If the Assignee shall have the debt against the Executors of the Debtor or not, 187
Debt upon an Obligation good, although he declares *per scriptum obligatorium*, 209
Upon a penal Statute, 256, 257
Debt in the Common Bench or other Courts, upon a Judgment in the Kings Bench: If *Nul tiel Record* be pleaded, how it shall be certified, 297, 298
Debtee, where he makes one of the Debtors his Executor; Whether the debt be determined, 372, 373

Devastation.

What shall be a Devastavit by an Executor, 490, 491, 564
In *Baron* and *Feme* for the Devastation of either, 603

Devises.

How they shall be expounded, 23, 24, 39, 129, 130, 157, 185, 186.
Where a Devise shall convey an Inheritance by implicite words, 23, 368, 369, 447.
What shall be a countermand and total revocation of a Devise, and what not, 23, 24
Devise of an house *cum pertinentiis*; Whether Land occupied therewith, passeth, 57
Of all his Goods and Mortgages to his Executors, is a good devise of the Land mortgaged, 37
Of all his Lands and Tenements: If he hath Land in fee & a Lease for years, what shall pass thereby, 292, 293
Of Land paying such a sum out of the issues and profits thereof, How it shall be expounded, 158
Of Land to one son and his heirs, and of other Land to another son and his heirs; and if any of them die without issue, the other shall be his heir, whether it be an Estate tail,

and how to be expounded, 185, 186
Devise to his brother and his heirs; and for default of such heirs to the sister and her heirs; whether it be a good remainder, 57
Devise to three and their heirs, and to every of them part and part alike; They are Tenants in common, and not Joynt-tenants, 75
To his son and heir of his Land, upon condition he shall pay his debts; Whether it shall be Assets by descent, 161
To *John* his son and his heirs of his body in fee; and if he die in the life of *Alice* his wife, That then *William* his second son shall be heir to *John*. Afterward *John* dies, having issue a son in the life of *Alice*; whether *William* shall have it in the life of the son of *John*, 158
To his *Feme* for life, and that afterwards his Executors shall sell and distribute the money to such, &c. Whether they have any interest in the Land, or but an authority only, and whether the Survivor may sell it, 382
To his Executor for life, and that he shall sell the said Land, if there be not Assets to pay his debts; he sells by Deed inrolled; whether the said sale be good, 335, 336
Devise of his Lands in Lease to his Executor for life, the remainder over; There ought to be a special assent thereto by the Executor, as to a Legacy, or else it is not executed, 293
Devise of his Lands in *A.* and *B.* to several persons and their heirs, and all the rest of his Goods, Leases, Estate, Mortgages, &c. whereof he was possessed, to his wife, whom he made Executrix; an Estate only for life passed, 447, 449, 450
Of an house called the *White Swan*, where *Nicholls* inhabits, whereas he hath but three rooms therein; whether the intire house passeth, 130, 131.
Of his corner house in the Tenure of *J. S.* and *J. N.* and the said house is in the Tenure of *J. S.* and *J. D.* and his house adjoyning is in the Tenure of *J. N.* Whether and what shall pass, 447, 448, 473
Devise of a term, with divers Remainders over, to make a perpetuity; whether good, 230
Vide tit. Testament.

Diminution of Records.

Where, how, and of what things it shall be allowed, being certified upon a Writ of Error, 90
At what time it ought to be alledged, 90
Whether it may be of a Writ original, when a Writ is before certified, 90, 91, 272

Descent.

Of a Reversion expectant upon an Estate for life, How it shall be construed in case of Custome, 411, 412
Vide tit. Fines.

Discharge.

Where it may be good by Parol in an Assumpsit, without shewing how, 383, 384
Where a Prisoner may be discharged by Paroll, 447
Whether Forest Lands in the hand of a Purchasor be discharged from payment of Tythes, 94
Vide tit. Release.

Discontinuance of Suits.

What shall be said to be discontinuance of Process, 235, 236
Where it may be pleaded to part, and not to all, 313
Whether it shall be discontinuance of a Plea, where day is not given to one of the Defendants after verdict; where the Court will advise till another Term, 236
Whether after Verdict it be aided by any Statute, 235, 236

Discontinuance in Lands.

Where an Act may be a Discontinuance now, and not be a discontinuance by matter *ex post facto*, 406

Whether

Whether it shall be a discontinuance of the possession, where *Baron* and *Feme*, Tenants to them and the heirs of the body of the *Baron*, Remainder over, makes a Feoffment, and afterwards levies a fine to the same Feoffee, and the *Baron* dies without issue, and the *Feme* survives, 320, 321.

Whether it shall be a discontinuance of the Reversion, where Tenant in tail, and he in Reversion in Fee joyn in a Lease for life, 385, 405, 406.

Dispensation.

Whether a Dispensation to take a second Benefice may be upon condition, and by what words, 475,476

To take a second Benefice *modo non sit ultra* twenty miles, how to be expounded, 475,476

Disseisor and Disseisin.

Who shall be Disseisor and Tenant, where the Lessee at will makes a Lease for years, rendring Rent, and the Lessee for years enters and pays the rent, 303,304

Whether it be a disseisin, where Lease for life is made with Letter of Attorney to make livery, *Habendum a die datus* of the livery, 388,389

Disseisin of a Rent Seck, for refusing to pay it, being demanded, at the place where it is issuing, 508

Tenant in Remainder disseised, not knowing thereof, levies a fine to a Stranger; Whether it shall bar his Right, and inure to the benefit of the Disseisor, 284,303,305

Distress.

Where a Distress may be maintained by one who claims by a Conusor by fine or other Record, without a *Scire facias*, 598

Distresses for *valore Maritagij* relief, or for Amercement in Leet; Whether maintainable, 533,534

Divorce.

What be absolute, and what temporary, 462,463

Propter sævitiam, 16,461,462,463

Double Plea.

Where it shall be, if he confess and avoid and traverse, and how it ought to be specially alleadged upon Demurrer, 61

Dower.

Of what things it is demandable, 300, 301.

Demanded against equity and the husbands agreement, at the time of the purchase (That instantly he should reconvey it) Whether it shall be recovered in a Court of Equity, 190,191

Nunques accouple que Dower pleaded, 351,352

Ejectione firmæ.

OF what things it lies, 555

Whether it lies for Tythes, 301

Whether it lies for him who hath only *primam tonsuram* in Land, 362

Of 100 acres of Bogg in *Ireland*, 512

Of a Piscary, 492

De uno Repositorio, 554,555

What special Plea is allowable therein, 404

Election.

Where it is at the election of the party injured to have several Actions, 242,243,303,539,540.

Elegit.

Whether the Bailiff of a Liberty, who hath return of Writs, may make an extent upon an *Elegit*, and deliver the moity, 319

Where the Writ recited the Judgment, *& quod elegit executionem* of the goods and moiety of the Land:

where the Tenant pleads but to part in a Writ of Right, and Iſſue taken and tried thereupon, 310,311
Whether it lies for the King upon an Indictment of Recuſancy, 505
Error to reverſe a Fine acknowledged, 415,416
Error, becauſe more Jurors than twelve were in a Writ of Enquiry of waſte, 414
Error where Writ is awarded to the Coroners, where the Sheriff is Plaintiff or Defendant, 345,346
Where three Executors ſue, and the one is ſever'd, and Judgment given for the two who proſecute; whether it be error, 420,421
Error brought againſt three Executors where one appeared and confeſſed the Action and Judgment, *Quod recuperet Debitum* againſt the three, and Execution *de bonis Teſtatoris, ſi tantum*, and damages *de bonis propriis* of him who appeared, and *Miſericordia* againſt all, 564
Where the *Venire facias* is againſt two Defendants and the Iſſue tried; whereas the one was dead before the *Venire facias* awarded, Whether it be error, 426
Where Juſtices of Peace proceed to trial upon an Indictment of Treſpaſs, the ſame day that it is found and traverſed, It is erroneous, 340, 438,448,449.
Error of a Judgment in an inferiour Court, becauſe it was *Ideo conceſſum eſt*, where it ſhould have been *Ideo conſideratum eſt, &c.* 442,443
Whether it be error in a Judgment of waſte, where it was aſſigned in cutting down 20 Appletrees; and the Jury find the waſte in cutting down two Appletrees, and no Judgment of *Ideo in miſericordia pro reſiduo*, 453
Error of a Judgment in the Common Bench; if it may be reverſed in part and affirmed in part, 471
Error brought here of a Judgment given in *Ireland*, and reverſed; how the proceedings ſhall be thereupon, 511,512
Error lies not where Judgment is entred againſt the Defendant by default, 517
Error, Becauſe the Judgment was *Quod querens nil capiat per Breve*, where it ſhould be *Nil capiat per Billam*, 580
Error in part of an Order cannot vitiate the whole Order, 471

Eſcape.

Where it ſhall be where a Priſoner goes at large with his Keeper, by colour of an *Habeas Corpus*, 14,466
Whether the eſcape of one in Execution be cauſe of diſcharge of the other Debtor, 74
Eſcape and breach of Priſon, the difference, 210

Eſſoyne.

How, and when to be made by the Judges, 13,14,200
Ought not to be caſt for the Defendants or Tenants, where they appear by Atturney, 511
After once default and reſummons, an Eſſoyn is not allowable, 341

Eſtate.

There cannot be a fraction of Eſtates in Deeds, 548
Eſtate contingent, by what act it ſhall be deſtroyed, 102,103,364,529
Where an Eſtate of Inheritance ſhall be created by Deviſe, 230,447
Eſtate limited to *Baron* and *Feme* in the *Habendum* to the uſe of them and the heirs of their bodies; whether it be an Eſtate tail, 230,245
Eſtate for life limited by expreſs limitation, ſhall not be an higher Eſtate by implication, 367
Eſtate upon ſurrender of a Copyhold to the uſe of one for life; and for want of iſſue of his body, to the uſe of another and his heirs: What eſtate the firſt hath, whether for life only or not, 567

Eſtoppel.

Leaſe by Indenture ſhall eſtop the party in pleading: But the truth being found by the Verdict, the Court

Court ought to adjudge according to the truth, 110
Where an Estoppel may be against an Estoppel, 478

Estranger.

Whether a party named in a Deed that doth not seal it, shall be counted a Stranger unto it; and when he shall take advantage thereof, 289

Exception.

Whether it may be after the limitation of an Estate, 437

Exchequer. Vide Court.

Excommunicato capiendo.

How it ought to be made, 197,199, 583.
Whether it shall be good, not being for any of the five causes mentioned in the Statute of 5 *Eliz.* 197,199
Whether, being at the Suit of the party, he shall be discharged by a general pardon in Parliament, he not being excepted therein, 199

Execution.

Execution without satisfaction, is no bar, 75
Taken against one is no bar, but that he may sue the other, 75
One taken in Execution in *London*, and removed by *Habeas Corpus* into the Kings Bench, shall be committed there in execution for that Debt; and having discharged all causes in the Kings Bench, shall be remanded, 128
Whether it shall be awarded, where the party formerly taken, rescued himself and escaped, 75,109,203 240,255.
It cannot be of a Judgment in an inferiour Court by *Certiorari* and *Mittimus* thereupon, 34
What Execution shall be taken forth against him, who, hanging the Suit, is made a Peer of the Realm, 205, 206.
Execution upon a Record of Attainder of a Felon removed out of another Court, 176
Upon a *Scire facias* by the husband, upon a Judgment in Debt brought by him and his wife, as Administratrix, 464

Executor.

Who may be an Executor, 9
Whether upon a Non-suit he shall pay Costs, 29
Whether he shall be charged in the *Debet* and *Detinet* in Debt, for Rent, upon a Lease for years made to the Testator, arrear after his death, 225
Whether he may distrain for a Rent-charge granted by the Testator for divers years, the years being determined, 471
Whether an Executor or Administrator shall be inforced to find Bail upon the Statute of 3 *Jac.* in a Writ of Error, or shall have a *Superfedeas* without Bail, 59
Where an Executor suffers a Judgment in Debt, for a debt of the Testator, and dies intestate; whether a *Scire facias* lies upon this Judgment against the Administrator of the first man, 167
Whether Judgment shall be against an Executor for the intire Debt, where it is found that he hath Assets but for part of the Debt, 167
Whether an Executor shall be charged in Debt by a Contract assigned by the Commissioners of Bankrupts, 187
Where an Executor or Administrator shall be said to be assignee, 289
How the authority of Executors may be divided, 293,420
What shall be said to be an Assent of an Executor unto a Legacy, 293
Whether he shall have an action against a Sheriff, for not returning a Writ, and for what wrongs done *in vita Testatoris*, 297
Where an Executor shall be charged *de bonis propriis*, 518,519,526,527,565
Whether he may plead a Stat. for the payment of money at a day to come against

againſt a Debt upon an Obligation, 363
Whether the Executor of an Obligee, being alſo Executor to one of the Obligors, may have debt againſt the ſurviving Obligor, 372,373
Whether an Executor, accepting the principal Debt upon a Bond forfeited, and making a Releaſe, it ſhall be a *Devaſtavit* for the reſidue, 490
Whether Executors ſhall have the next avoidance of a Benefice granted unto their Teſtator for life only, 505,506
Executor *de ſon tort*; whether chargeable where an Adminiſtrator hath fully adminiſtred the Teſtators goods, 88,89

Expoſition.

Of Statutes, how to be made, 34,83, 84,85,533.
Of Deeds, 173,548
Of Words, 222,393
Of the words *cum pertinentiis*, 17,18, 57,169,482.
Firmum facere, 202
Provided, 128,129
Si modo, 475,476
Terdecem annos, 386
Quinginta for *Quinquaginta*, 259
Solvendo, 289
Catalla, 293
Repoſitorium, 555
Cum ſera appenſa, 562

Extent.

How goods extended before the Liberate are bound thereby, 149
How to be made by the Bailiff of a Liberty upon an *Elegit*, 319
Whether it may be awarded for a common perſon againſt one who is in Execution for Debt to the King, 389,390
Upon a Statute Staple; whether it may be by the Sheriff when the party dies, after the *Teſte* of the Writ and the inquiſition taken, 451,452,457 458,459.

Extinguiſhment.

Where it ſhall be of a way by unity of poſſeſſion, 418,419
Parſon, Patron, and Ordinary, before 13 *Eliz.* made a Leaſe for ninety nine years, (there being a former Grant of the next avoidance:) The Parſon dies; the Grantee preſents an Incumbent, who avoided the Leaſe, It is thereby totally extinguiſhed, as to his Succeſſor, 582

Extortion. 438,448,449

Falſe Impriſonment.

WHere one is arreſted upon a *Capias* and the Writ not returned at the day, 446,447

Fees.

What Fees Sheriffs ſhall take for ſerving Executions, 286,287

Felony.

Whether the burning of a mans own houſe maliciouſly, to burn the houſes adjoyning, be felony, 376,377, 378.
Whether it be felony in a Souldier to depart from his Conductor without Licence, 71
Where Felony committed in one County may be tried in another adjoyning County, and where not, 247,248
Whether it be Felony in a woman divorced to take a ſecond husband, the firſt living, 461,462,463
Where one attempts to break open a houſe, with an intent to commit Burglary, or to kill any therein, and a Stranger within the houſe kills him, it is no Felony, 544

Feme.

What ſhal be ſaid to be forcible taking a Maid againſt her will, 488,489
Feme ſole recovers in an Action, and before

before day in *Banco* takes *Baron*, ſhall have her Judgment, 232
Feme ſole Merchant, how to be ſued, 68,69
Feme covert, where ſhe ſhall be prejudiced in her Inheritance by her Husbands Act, 7
Whether, if ſued with her *Baron*, ſhe may appear to avoid impriſonment, &c. 58,59
Cannot be charged with her husband for converſion of goods to the uſe of them, 254,494,495,519
What Goods a *Feme Covert* may have 519,554
Feme Obligee takes one of the Obligors to husband, It is a diſcharge for all the Obligors, 551
Joyn with her Husband in a Letter of Attorney to deliver a Leaſe, 165
To what intents ſhe may make a Will; and where the Husband is tied to perform it, 219,220,376,597
Feme divorced takes a ſecond husband, the firſt living: whether it be Felony, 461,462,463
Vide tit. Baron & Feme.

Fieri facias.

Baron & Feme Executrix ſued in debt: And upon Judgment and *Fieri facias*, *nulla bona* being returned, the Plaintiff procured a new *Fieri facias*, *& quod ſcire facias* to the Defendants, to be in Court ſuch a day: who then appeared and demurred upon the Writ: which being adjudged good, and that they ſhould anſwer, they imparling, Judgment was given by *Nihil dicit*, That the Plaintiff ſhould have Execution *de bonis propriis*, 518, 519, 526, 527, 528.
Fines of Lands, 524, 525.

What ſhall bar the heir in tail, 434, 435,543.
Fine and Nonclaim, what Actions it bars, and who may take advantage thereof, that hath nothing in the Land, 110,156,200,201,576,577
Fine with Proclamations, at what time and by whom they ſhall be avoided, 156,157,209
With Proclamations and five years paſſed, whom it ſhall bar, 576,577
With Proclamation to the heir, who enters during the Nonage of the Deviſee, and Nonclaim within five years; whether it ſhall bind the Deviſee, 200,201
Levied by *J. S.* Uncle of *A.* an Ideot, who was ſeized of the Inheritance, the ſaid *J. S.* dying in the life of *A.*) ſhall not bar the Grand-child of the ſaid *J. S.* 524
Fine levied by the Diſſeiſee to a ſtranger; where it ſhall enure to the benefit of the Diſſeiſor, 303,305,483, 484.
Levied by a Diſſeiſee to a ſtranger, not knowing of the diſſeiſin; how it ſhall enure, 484
Levied by the eldeſt ſon, heir in tail, who dies without iſſue in the life of his father, Tenant in tail: whether his younger brother ſhall be barred by this fine, 434,435
Levied by him who occupies in truſt and hath the Inheritance and Nonclaim; whether it ſhall bar his Leaſe for years, 110
Whether it may be levied of a place known, without mentioning of any Vill or Hamlet; where it lies, 219, 269,276.
Quod partes finis nihil habuerunt, 514, 524.

Fines aſſeſſed in Courts.

Aſſeſſed by Judgment openly in Court, cannot be qualified, 251
How they ſhall be aſſeſſed in Judgments upon Informations, 251
Aſſeſſed for Treſpaſs in a Foreſt, may be levied by Proceſs in the Kings Bench, 409,410
Aſſeſſed by the High Commiſſioners, How to be levied, 113,114
Impoſed upon an Atturney, for proſecuting Actions without ſuing original Writs, 74
Impoſed upon an Attorney, for falſifying and forging a Writ of *Capias*, 74
Impoſed upon a Clerk, for entring and certifying a too prolix Record in abuſe of the Subjects, 164

For amending a Record before and without direction of the Court, 278
For a miſpriſion in a Record, 278
Fine not impoſed, *quia pauper*, 74

Firſt Fruits and Tenths.

The Books of the valuation of them, when compoſed, 456

Foldcourſe.

Whether a Foldcourſe may be divided 432

Forcible entry.

Endictment upon the Statute of 8 *H.* 6. of forcible entry in Tythes, 201
Whoſoever is owner of the Soil may enter lawfully and detain with force againſt any who pretends to have Common there, 488,489

Forfeiture.

What ſhall be forfeiture of a Jointure within the Statute of 11 *H.* 7. 244
By the husband of his Copyhold in right of his wife: where it ſhall bind the wife and her heirs, after the husbands death, 7
Whether a Copyhold may be forfeited by making a Leaſe thereof for one year without the Lords Licence or ſpecial cuſtome, 233,234
Whether it may be forfeited for not paying the ſet fine, 196

Foreſt.

Where the Juſtices Seats are to be held in Foreſts, 409,410
How fines, in Juſtices Seats in Foreſts aſſeſſed, may be levied, 409,410
Whether Foreſt Lands purchaſed from the King, which were exempted from payment of Tythes, ſhall be diſcharged in the hands of the Purchaſors, 94

Franchiſes and Liberties.

How they may be deſtroyed or determined in Parks, 59,60
Where they ſhall be ſeized for abuſing them, 253

Franktenement.

Where it may be granted by Copy, 200
Whether he ſhall be ſaid to have a Franktenement who hath *primam tonſuram* only in a Meadow, 362

Fraud, Vide Colluſion.

Gavelkind Land.

ITs Properties and Cuſtomes, 584, 561,562.

Grants.

Grants of Land and Common; whether it ſhall be intended to be in groſs or appurtenant, 300,301
Of a Rent: whether it ſhall be by the word *Reddendum & ſolvendum* in an Indenture of Leaſe, 288,289
There cannot be a Grant of an Inheritance *in futuro*, 448,547
Of a term, *Habendum* after the death of the Grantor; It is an immediate Grant and a void *Habendum*, 155
Of the next avoidance of a Church unto one during his life; whether his Executors after his death ſhall have it, 505,506
None may entitle himſelf to any Copy-hold, but he muſt ſhew a Grant thereof, 190
The addition of a falſity in a Deed or Grant, ſhall never prejudice, where there was any certainty before, 548

Vide tit. Deeds.

Grants of the King.

Where it ſhall be void for non-recital or miſ-recital of a former Grant thereof; and where a *non obſtante* ſhall help it, 198,548
Where an Office is found for the King by Commiſſion under the Great Seal; where the Kings Grant ſhall be good, and where not, 172,173
Of a Meſſuage and Land appertaining thereto;

thereto; how it shall be construed; and what Lands in the Kings case shall be said to be appertaining, 21, 22.
Where there is a falsity in point of prejudice to the Kings benefit or a misinformation of the Kings title, or upon a false suggestion, There all Grants made by the King shall be void, 548

Habeas Corpus.

IN an *Habeas Corpus* the return of the cause of the commitment of the Prisoner ought to be certain, 133,558,559,593
If no cause of commitment be returned in the *Habeas Corpus*, the Prisoner shall be discharged by Bail, &c. 507, 552
Habeas Corpus, and *Certiorari* to remove a Prisoner attainted for Felony in another County; and Judgment to have execution given in the Kings Bench, 176
To remove a Prisoner in execution, How, and in what manner he ought to be used; And where it shall be an escape, under colour thereof, 466
For a Prisoner committed by the Lords of the Council, and returned thereupon, 133,168,579
To remove a Cause, and the proceedings thereupon, out of an inferiour Court, 261
Upon *Habeas Corpus*, Prisoners discharged without Bail, 569,570
Habeas Corpus by one who was committed by Order of the Exchequer, for not paying a fine imposed upon him by the Ecclesiastical Commissioners, 579,582

Habendum.

Where repugnant to the Grant, how to be construed, 155,400
To one, to the use of another and his Heirs; Whether this limitation of the use gives more than the Estate for life, 230,245

Habere facias possessionem.

How to be awarded into *Ireland*, 512

Hariots.

Whether he who demands an Hariot, and demands thereupon, ought to shew the kind of beast, and the price thereof, 260

Heir.

The words in a Will which disinherit an Heir, ought to have an apparent intent, 369,450
How the heir shall be charged, where he denies the Deed to be his Fathers, 336,337
How he shall be charged in a *Scire facias* upon a Recognisance of his Fathers, 295,296,312,313
Whether he shall have the rent, where the Lessee covenants to pay the rent to the Lessor, his Heirs and Assigns, 207
Upon a Mortgage for the payment of mony, performed by the Daughter; a Son is afterwards born: Whether the Son or Daughter shall have the Land, 87

Honour.

Where an Honour consists of several Manors, How the Courts of the Manors are to be holden, 367

Hostler and Inn-keeper.

May detain the Horses of his Guests for non-payment of their pasturage; But so cannot a private man, 271,272
Whether an Inn-holder is within the Statute of Bankrupts, 549,550

Hue and Cry.

When, and how it shall bind, 37
Whether it may be made in the adjoyning Hundred, 37,41,379,442

High-way.

Incloſed an Information brought thereupon, 184,185,266,267

Jeofayle.

WHere it is aided in the Kings Suit, 312,315
In a *bis petitum* in Dower, 301
Where the recital of the Bills is *in placito tranſgreſſionis*, and the Declaration is in an Action upon the Caſe, 325
Where the Declaration is variant from the original Writ, 327
Vide plus in Statutes.

Implication.

Where it ſhall increaſe an Eſtate, and where not, 367

Impriſonment.

Where it ſhall be appointed by the Commiſſioners for Eccleſiaſtical cauſes, and where not, 114
Impriſonment during life is not uſually awarded, but where there is an awarding of forfeiture of Lands during life, 504
None may ſtay or impriſon any without an Officer, unleſs in Felony, 235
Vide plus Priſon & Priſoners.

Inducement.

What certainty an Inducement to a Plea ought to have, 138
Inducement to a Travers ought always to be ſufficient in matter, 336

Infant, Vide Enfant.

Information.

Againſt an Under-Sheriff for ſeveral crimes and miſdemeanors, 566,567
For Non-reſidency before Juſtices of Aſſiſe, 146
Upon a penal Statute; where it may be in *London*, or in an inferiour Court, 112,146
Againſt the Mayor and Commonalty of *London*, for ſuffering offendors to eſcape, who had committed murder publickly, 252
For a Riot and Reſcous 251,252
For incloſing an High-way, 266,267
Where it ſhall be good for the King, where it is ill for the party who informs for the King and himſelf, 331
Information brought in the Kings Bench for miſdemeanors, 579
Where Informations are brought upon a penal Statute, where part is given to the King, and part to the Proſecutor, there it ought to be *Qui tam pro Domino Rege, &c.* Otherwiſe it is where the King is only named as an offence againſt him, 336
Information for the King, the City of *London*, and himſelf, againſt a Currier, 588,589
Informers, how to be ſworn, and to have the moiety, &c. 316

Ingroſſing.

What ſhall be ſaid to be ingroſſing, and within the Statute of 5 *Ed.* 6. 231,232,314,315

Inn-keeper, Vide Hoſtler.

Inrollment. Vide Relation, and Bargain and Sale.

Inſtitution and Induction.
354,355, 356,357.

Under what Seal it may be, 342
Trial of Inſtitution ſhall be by the Biſhop: Of Induction *per pais*, 380
Without a Preſentation is void, 99
Vide plus in Quare impedit.

Intendment.

Where it ſhall make a Declaration and Plea good, 6, 63, 64, 80, 195, 221, 272, 301, 387, 341, 363, 383, 386, 392, 401, 413, 426, 458, 461, 472, 497, 539, 555.
Where it ſhall make a Sheriffs return good, 189
It ſhall be taken according to the common

mon parlance, 192,226,510
It ought to be construed according to the rules of law and reason, 413
Intendment shall not make a Replication good, 80,94
Where the Condition of a Bond shall be made good by intendment, 226

Joynder in Action.

Where it may be by the King and a common person, 256,257
Where it ought to be by *Baron* and *Feme*, 419,437,438
In *Audita Querela* by three, where one only was taken in execution, 443, 444.

Joyntenants.

Devise of Lands to three, part & part like; whether they be Joyntenants or Tenants in common, 75
Action real brought against Joyntenants or Coparceners; the death of one of them shall abate the Writ, 574,583

Joynture.

What shall be said to be a Jointure within the Statute of 11 *H.* 7. 244

Ireland.

How *Habere facias possessionem* shall be awarded into *Ireland*, 512
Whether a Prohibition lies for a thing done there, 264

Issue joyned.

Where it shall be found for him who pleads, when it is found in substance but not in words, 148
Upon payment made 31 *Septemb.* 78
Tried upon an ill and void plea; how it shall be good, 25
Whether it shall be an Issue, and may be well tried when it is in the affirmative without a negative, and the conclusion is, *Et de hoc ponit se super patriam, & querens similiter*, 80,316, 317.
Quod ipsi non sunt culpabiles in an Action against the *Baron*, for the wrong done by his *Feme*, 417
Although the Plaintiff joyneth issue upon a defective Plea, yet having a good Declaration, and found for him, Judgment ought to be given for him,

Judgment.

Where Judgment shall be *Ideo in misericordia*, and where *Ideo capiatur*, 32,178,561
Where the Defendants are found severally guilty for several causes and several damages given, Judgment that one of them be in *Misericordia*, and that one *Misericordia* be against the Plaintiff, where the Defendants are severally found *Not guilty* for part, 54,55
Where the Defendant, after imparlance pleads out-lawry, and, upon *Nul tiel Record* pleaded, fails of the Record, Judgment shall be absolutely given, and not a *Respondes ouster*, 566
Baron and *Feme* sues in Trespass; the *Baron* dies betwixt the day of *Nisi prius* and day in *Banco*, no Judgment shall be entred, 509
Judgment against *Baron* and *Feme* Executrix, by *nihil dicit*, to have Execution *de bonis propriis*, 518,519 526,527,528.
Judgment against *Baron* and *Feme*, *Quod capiantur* in Trespass, where the *Baron* is acquitted, 506,507
Et e contra, 513
Judgment against an Infant, *Quod non sit in misericordia*, 410
How it ought to be given in a VVrit of Right, 310,311
How it shall be where several damages are found against several Defendants, 54,55,192,193
Given for the Plaintiff, where the Issue is found for him upon an idle and void Plea, 25
Erroneous, because it was *Ideo concessum est*, 442,443
Against an Executor, when it shall be of the intire, where Assets is found but for part of the Debt, 167
Against an Executor or Administrator

tor for costs, 219
Against an heir, where he pleads a false plea, which lies not in his conusance 436,437
Judgment reversed in an *Ejectione firmæ*, because the Declaration was of a Messuage and forty acres of Land Meadow and Pasture, and do not distinguish how much of every one, 179,573
Judgment reversed, because it appeared by the Declaration, that the Action was brought before there was any cause of Action, 575
Judgment reversed in the Common Bench, because an Atturney there brought his Action by a Bill of Priviledge; and the Judgment was *Quod querens nihil capiat per Breve*, where it should have been *per Billam*, 580
Judgment reversed in Debt, because the Defendant pleads payment of 21 l. 6 s. 8 d. And the Plaintiff saith *Non solvit* the said 51 l. 6 s. 8 d. and so there was not any issue, 593
Where it shall be for the Plaintiff after Verdict for him, although there be no original Writ nor Bill filed, 281,282
Where it may be reversed for part, and affirmed for part, 471
Judgment to reverse a Judgment in an inferiour Court, in a *Formedon* given for the Defendant. The Plaintiffs Declaration being ill, how it shall be given, 444,445
How it shall be where Tenant by Receipt makes default, 263,264
Judgment against an Atturney, who falsly demeaned himself, 78
Against one who offred himself as a Subsidy man to be bail, and so did swear that he was, and afterwards confessed it to be false, 148
Against one for publishing a Libel, 175
Against one for scandalous speeches, used to a Judge sitting in Court, 504
Against one for striking in *Westminster Hall, sedentibus Curiis*, 374
Of the Pillory and Fine for Riot in a Rescous, 506,507
Judgment against one for cheating with false Tokens, 564
Judgment upon an Endictment for taking a child under the age of ten years, although the party did not ravish or carnally know her, 332
Judgment upon an Endictment upon the Statute 31 *H.* 8. for taking a Maid inheritrix forcibly, and marrying her, &c. 484,488,492
For burning his own house in a City voluntarily, to the intent to burn the adjoyning Houses, 378
In Treason, for counterfeiting Coin, what it shall be, 383
In Treason, upon the Statute 25 *Ed.* 3. for speaking traiterous words against the King, 332,333
Upon every conviction in Endictments the Judgment ought to be *Quod capiatur*, 505.

Judges and Justices.

Chief Justices of the Kings Bench, how made and amoved, 52,65,225,403
Removed, and pleads afterwards as a Serjeant at Law, 375
Justices of the Kings Bench, their authority, 213,464.
Justices of the Common Bench made Justices of the Kings Bench, and how their Seniority may be preserved, 127,128
Chief Justice of the Common Bench, and Lord Keeper of the Great Seal, both one person at one time, 600
Chief Justice of the Common Bench discharged, and another made, 375
Justices of both Benches made, 1,2,3, 4,211,225,268,339,375,403,567 568.
Chief Baron of the Exchequer hath his Office *quam diu se bene gesserit*; but the Judges of both Benches are made *durante bene placito Regis*, 203
Chief Baron being commanded by the King to forbear the exercising of his Judicial place in Court, would not leave his Place, nor surrender his Patent without a *Scire facias*, 203
Judge and Officer, who may be, 138
Justices of the Forest, 409,410
Justices of *Oyer* and *Terminer*, whether they may try Souldiers departing from their Captain and Conductor without

without Licence, 72
Justices of *Oyer* and *Terminer*, whether they may inquire and take travers, and determine Endictments the same day, 448
Justices of *Nisi prius* or Assises, their authority, 112,211
Justices of the Grand Sessions of *Wales*, their authority, 342
Justices of Peace, whether they may be made by Patent, 223
What Acts he may do as Justice of Peace out of the County, 212,213
Their power of inquiring about Informations, 112,113
Cannot compel any to enter Recognisance, or may use any coercive power out of the County, 213
Whether they may take Enquests, try, and determine civil offences in one and the same day, 438,439,448, 449.
May take money to lie *in deposito* for the security of the Peace, 446
Their power upon the Statute of 5 *Eliz. of Labourers*, 213
Ought not to assess damages themselves without enquiry by the Jury, 448,449
Their power about making Orders in case of Bastardy, 213,341,350 351,470,471.
Their power upon the Statute of 15 *R. 2. of forcible entries*, 486
Whether, at their Sessions, they may try Souldiers running away from their Captain or Conductor, 72
A Warrant from a Justice of Peace to an Officer, for the levying of a rate unduly taxed, will not excuse the Officer, &c. 394,395
How Justices of Peace are to proceed against one, who, being elected an Officer, refuseth to be sworn, 567
Words actionable of a Justice of Peace *He is but an half-ear'd Justice*, 223. *I could never get any justice, but injustice at his hands*, 14

Jurors.

Whether one outlawed in a personal Action may be admitted to be a Juror, 134
Challenged after he was marked to be sworn, cannot be withdrawn without consent, 291
Where if mis-named it shall be a mistrial, 194
Jurors having lain all night, and not agreeing, one of them by consent was withdrawn, 484
Whether Jurors in a private Jurisdiction, have a power to assess damages for the Plaintiffs loss in another County, 571

Justification.

Every one may justifie the apprehending of a Common Cheater with false Dice, to carry him before a Justice of Peace, 235
None can justifie the cutting of anothers Net who fisheth in his Piscary; But he must take them damage fesant, 228
Where in Trespass of Assault and Battery the Defendant justifies at another day and place, 514, 515, 572, 573.

King.

WHether the King may enter into warranty as Vouchee by the Atturney General; And how a Remainder in tail in him may be barred by barring the Remainder over, 96,97
Where the King may take advantage of a Condition broken without Office, & where not, 99,100,172,173
Where the King and a Common person may joyn in Action, 256,257, 336.
The King may wave a demurrer or issue; but not any other person, without the Atturney Generals consent, 347
The King may present to any Church which he hath in right of Wardship, either, under the Great Seal, or under the Seal of the Court of Wards, 99,100
May try his Issue at the Bar or by *Nisi prius*, at his pleasure, 247
The King shall never render in value upon Voucher, 97

A com-

A common perſon ſhall not have execution againſt the Kings Debtor, until agreement for the Kings debt, 390
The omiſſion of a Clerk ſhall not prejudice the King, 349
Whether Error lies for the King upon an Endictment of Recuſancy, 504
Whether a ſucceſſor King may take advantage of a lapſe incurred in the time of his Predeceſſor, 335,336
Where a Freehold may paſs from the King, without a Patent under the Great Seal, 513
Where title appears for the King, the Court, *ex officio*, ought to award for him, 590,591,592

Lapſe.

WHere it ſhall incur, 357
Vide plus in Quare impedit.

Leaſes.

Leſſee for years aſſigns over his Leaſe in truſt for himſelf; and after purchaſeth the Inheritance & occupies the Land, and levies a fine with proclamations: Whether this intereſt be barred, the Truſtee not claiming his Leaſe within five years, 110
Where one Covenants and grants, That *J. S.* ſhall enjoy ſuch Lands for ſix years; and *J. S.* covenants to pay annually ſuch a ſum unto him: Whether this be a Leaſe for years, 207
Leaſe for years by Indenture, by him who hath nothing therein: Whether it ſhall bind, being found by Verdict, 110
Whether a Leaſe for years may be deviſed to one and the heirs of his body, with Remainders over, and ſhall be good by way of limitation, 230
Leaſe, *Habendum a die datus Indenturæ* for life, with Letter of Atturney to make livery after the day; and livery is made accordingly: Whether it be a good Leaſe, 95
If the Leſſor fell the trees, living the Tenant for life, and the Tenant for life cut them down: Whether the Vendee ſhall have *Trover and Converſion*, 274
Whether the Leſſor may have *Trover & Converſion*, when a ſtranger, during the Leaſe for years, cuts down and carries away Timber Trees, 242,243,274
Leſſee for years aſſigns over his term, and the Leſſor accepts of the aſſignment; the Leſſor notwithſtanding may ſtill maintain his Action of Covenant againſt the Leſſee, for a Condition broken by the Aſſignee, 187 580.
Leſſee for years, upon condition that he ſhall not alien any part above three years, during the term; and if he do, That the Leaſe ſhould be void: Who lets for three years, and ſo from three years to three years, during the term of his life: Whether this be a breach of the Condition, 511,512
Leaſe for years, upon condition, That he ſhall not alien above three years during the term, *ut ſupra*; who lets *ut ſupra*: The Leſſor accepts the Rent of the Aſſignee at a day after: Whether this acceptance makes the Leaſe good, &c. 511,512
Leaſe for years, to begin after a former Leaſe determined, which is miſrecited; *Quære* when the laſt Leaſe ſhall commence, 398,399,400
Leaſe for years by Deed is raſed in a material part by the Leſſee, after the delivery: Whether the intereſt and term be determined and void as well as the Deed, 399
Leaſe by a Biſhop by Indenture, reſerving the ancient rent (but mentions not any rent certain, nor lets not all the Manor together, which was uſually demiſed under one rent) is a void reſervation, and a void Leaſe againſt the Succeſſor, 95
What ſhall be a good Leaſe within the Statutes of 32 *H.* 8. and 13 *Eliz.* 22,23
Leaſe made by Parſon, Patron, and Ordinary being avoided by the next Incumbent, diſchargeth all his Succeſſors, 84,85
Leaſe for years by *Baron* and *Feme*, of the Lands of the *Feme*: Whether void

void avoidable, 22,185
By *Baron* and *Feme*, of the Lands of the *Feme*, *Habendum* from *Mich.* for life; and Livery is made after *Mich.* Whether it be good, 171
Leaſe for one and twenty years, rendring the ancient Rent, by the *Baron* only, of the Lands whereof he is joyntenant with his *Feme* in Fee: Whether it ſhall bind the *Feme*, 22,23
Leaſe for years by *Baron*, ſeized in right of his *Feme*, Or by Tenant by the Courteſie, is void by his death, and not voidable, 398,399

Leet.

Where it may be within another Leet, and the difference betwixt a Leet and a Torn, 75,76
Whether for amercement in Leets & Court Barons upon a diſtreſs, damages and coſts ought to be given to the Avowant, 533,534,535

Letter of Attorney.

By *Baron* and *Feme*, to deliver a Leaſe upon the Land: Whether it is void or avoidable only by the *Feme*, 185
Vid. plus in Leaſes, and *Livery & Seiſin.*

Libels, 175.

Liberate.

Whether it may be by an Adminiſtrator, upon an Extent ſued by the Executor, 451,452
Whether the ſale of the Goods of a Bankrupt by the Commiſſioners, to another of them be good after *Liberate*, 149,150
Vide tit. exeunt.

Licence.

To incloſe an High-way, when, and how it ought to be obtained, 266, 267.

Limitation of Eſtates.

What ſhall be ſaid to be Limitation of an Eſtate, and what a condition, 230,231,367,577
Limitation of an Eſtate upon a poſſibility, after a poſſibility is void, 577

Limitation of Actions, 115.

Vide plus in Statutes.

Livery and Seiſin.

By an Attorney upon a Leaſe for life *a die datus*, made the ſame day of the date, is a void Leaſe and Livery, 94, 95, 388, 389

London.

Where a Cuſtom there may be pleaded againſt a Statute, 347,361
How the Cuſtoms there, are to be certified into other Courts, 516, 517
One taken in execution in *London*, and removed by *Habeas Corpus* into the Kings Bench, ſhall be committed there, in execution for that Debt; and having diſcharged all cauſes in the Kings Bench, ſhall be remanded, 128
Cuſtome for a *Feme covert* Merchant there, 68,69
Cuſtome, That one being Apprentice and made Freeman, may uſe any Trade, 347,361,516,517
Cuſtome, That every Citizen and Freeman of *London* may deviſe his Lands in Mortmain, 248,576
Cuſtome, That the Wife ſhall have the moiety of the Goods whereof her Husband died poſſeſſed, 344,345
An Action may be maintainable in *London*, which is not actionable in the Courts at *Weſtminſter*, 350,387
Where and how Wills of Lands in *London* are to be proved, 396
Aldermen of *London*, their priviledges 585
Why the Arch-biſhop of *Canterbury* never makes any viſitation in *London* Dioceſs, 340
Act of Parliament for the relief of poor Citizens and Freemen of *London*; being ſued there under fourty ſhillings, 572
Cuſtome for the payment of Tythes

for houſes in *London*, and where the Suit ſhall be, 596

Maintenance.

WHether it be Maintenance for an Attorney to ſolicite anothers buſineſs in another Court then where he is Attorney, 107,160
Inſormation upon the Statute of Maintenance, 232,233

Manor.

What it is, and what ſhall be reputed parcel thereof; and what time is ſufficient to gain a reputation, 308

Mariage.

If a woman be violently taken away and married, although ſhe aſſents thereto by force, It is a Marriage within the Statute of 3 *H.* 7. 488
Whether a *Feme* divorced from her Husband, and marrying a ſecond in his life, be a Felon, &c. 461,462,463
Fine to the King for inveigling one, being drunk, to marry in the night, &c. 557

Marſhal of the Kings Bench.

The Office thereof not grantable for years,
The Priſon of the Kings Bench is not any Local Priſon, confined to one place, 210,466

Meſſuage.

What Land paſſeth by the Grant of a Meſſuage *cum pertinentiis*, 17

Miſnoſmer.

Of a Corporation, where it ſhall make the Deed void, 160
Of a Juror in his Chriſtian name, whether aided by the Statutes, 202,203, 564.

Miſpriſion, Vide Amendments.

Miſrecital.

Of a Statute, *Quid operatur*, 135,136, 232.
Of the Kings Patents, where it ſhall make them void, 197,198
Of a former Leaſe, *Quære* when the ſecond Leaſe ſhall begin, 397,398, 400,502.

Miſreturn of the Sheriff, 223,224.

Miſuſing of Proceſs.

Where aided by the Statute of Jeofails, 90,91

Miſtrial.

What ſhall be ſaid to be a Miſtrial, 17, 20,202,203,275,284,480.
Where it ſhall be by miſnaming a Juror, 202,203
Where twenty three are only returned upon the *Venire facias*, and twenty four in the *Habeas Corpora*, and the twenty fourth Juror not returned, was ſworn, Whether it be aided by the Statute of Jeofails, 278
Where it is not aided by any of the Statutes, 284

Monaſtery.

Whether Monaſteries diſſolved by the Statute of 27 *H.* 8. which were freed from the payment of Tythe, be within the Equity, &c.

Monſtrans de faits.

He who comes in by act of Law, needs not ſhew the Deeds of his Eſtate, 209
Where upon a Deed of Covenant to raiſe an uſe out of a particular eſtate to which he is not party, and yet claims by that Deed, Whether he may plead the ſaid Deed, without ſhewing it; And where it ought to be ſhewn, 441,442
Where the Obligation ſhall be ſhewn by him, who is Aſſignee from the Commiſſioners of Bankrupts, 209

Mort-

Mortgage.

Deviſe of all his Goods, and Mortgages to his Executors, is a good Deviſe of the Land mortgaged, 37
Deviſe of his Lands in *A.* and *B.* to ſeveral perſons and their heirs, and all the reſt of his Goods, Leaſes, Eſtate and Mortgages, &c. whereof he was poſſeſſed to his wife, whom he makes Executrix, an Eſtate for life only paſſed, 447,449,450
Upon a Mortgage a Daughter performs the condition to pay the money, a Son is born after: Whether the Daughter may retain, or that the Son may *ouſt* her, 87

Mortuary.

Whether a Prohibition lies for ſuing for a Mortuary in the Eccleſiaſtical Court, 237,238

Murder.

What ſhall be ſaid to be murder, 131, 537,538.
To kill an Officer which comes to arreſt one, although he uſeth not the words of arreſt, nor ſhews his Warrant, is Murder, 68,183,537, 538
The often ſtriking and killing one who makes no reſiſtance, is Murder, 131

Name.

NAme of dignity accepted by the Plaintiff, hanging the Writ: Whether it be cauſe to abate it, notwithſtanding the Statute of 1 *Ed.* 6. 104
Name of dignity of a Baron deſcends upon one who is ſued by the name of Knight: What remedy he hath that Execution ſhall not be awarded againſt him, but as againſt a Peer of the Realm, 205,206
Name of dignity of Baronet omitted; whether it be cauſe to abate the Writ, and within the Statute of 1 *E.* 6. 371,372
Name of Corporations miſtaken, 572, 574.
Name of a Juror miſtaken, by what Statutes aided, 202,203
Whether a Sheriff ought to add his name of Office to Returns, 189,190 570,595.
Where Letters Patents name Lands by another name then when they came to the King; yet by a name certain *Quid inde operatur*, 168,169

Nolle proſequi.

Whether it may be entred againſt one Defendant, and Judgment prayed againſt the other, 238,243

Non obſtante.

Whether a *Non obſtante* of a non-recital or miſ-recital of a former Grant in the Kings Patent, ſhall aid the Grantee or not, 198

Nonſuit.

Upon a Record of a *Niſi prius* roll, varying in ſubſtance from the Plea-roll, and a new *Venire facias* awarded, agreeing to the Plea-roll, 203, 204.

Notice.

When and to whom it ought to be given, 34,35,132,133,574,577
Where it ought to be taken upon peril, &c. 392,393
Of a By-law, when, and how it ought to be given, 498

Nul tiel Record.

Pleaded, 297,298,565

Nuſances.

Whether the erecting of a Gate upon the High-way, to open & ſhut with the hand, be a Nuſance, 184,185
Whether every one may abate a Nuſance upon the High-way, 184,185
Erecting of a Tallow Furnace, &c. a Nuſance, 510

Nuſances ought to be certified into the Court, That they are abated or avoided, before the Endictment ſhall be quaſhed, 584

Oath.

WHere an Oath may be inlarged by direction of State, for the executing an Office, without an Act of Parliament, 26

Obligation.

Obligation with a Condition and a Bill obligatory, the difference, 515
Shall not be void by vitious writing, 416,418
Obligations and Bills obligatory, how they differ, 515
Obligation general for the performance of Covenants doth not alter the nature of Rent, but that it ought to be demanded, 76,77
Obligation with condition, for performance of a Symonaical Contract, is void, 361,425,426
With a condition to reſign a Benefice upon requeſt; whether the Condition be Symonaical and makes the Obligation void, 180
With a condition to pay upon the 31 of *Septemb.* Payment is pleaded to be at the day: And the Verdict found, there was no payment the ſaid 31 day, 78
With a condition for the payment of money at a day; How it ſhall be diſcharged by acceptance of another Bond before the day or after, 85,86,193
With a Condition, That the *Baron* ſhall ſuffer his *Feme* to enjoy the goods of her firſt husband without claim; What ſhall be ſaid to be a breach thereof, 204
By the *Baron*, with a Condition to ſuffer his *Feme* to make a Will; Whether it ſhall bind him; and what Will the *Feme* in ſuch caſe may make, 219,220,597
With a condition, Where it ſhall be good according to the intention of the parties, though not according to the words, 219,220
With a Condition; Where it ſhall be taken according to common Parlance, &c. 226
Whether an Obligation may be taken by a Sheriff, 287
Obligation, *Quinginta* for *Quinquaginta*, 416,417

Occupancy, 477.

Offices and Officers.

Officer and Judge, where one may be, 188
Where an Officer ſhall be puniſhed, although what he doth is by warrant from a Juſtice of Peace, 395
By what Acts, and for what cauſes Offices may be ſeized, 59,60,211, 491,492.
How they may be ſurrendred or determined, 198
Where, if granted in Reverſion after an Eſtate for life, *exercendum per ſe, vel ſufficientem Deputatum ſuum*, it be good, 279,556,557,558
In Miniſterial Offices, Deputies are allowable, 557
The office of Martial of the Kings Bench, not grantable for years, 587
Of the cuſtody of a Park or Stewardſhip of a Manor granted with the caſual profits; how it may be diſcharged or determined, 59,60
Of a Biſhops Chancellor, to whom grantable; and whether the Grantee may be ſued in the Spiritual Court and deprived there, and thereby loſe his Freehold, 65
A Sentence in the Star-chamber cannot take away an Office which is a Freehold, 65
Office of a Commiſſary; whether it may be granted to a Lay perſon, 258,259
What Offices be within the Statutes of 1 & 13 *Eliz.* of Spiritual perſons, 259,556,557
What Offices an Infant is capable of, 556,557

Offices by Inquiſition.

Where they ought to be found, before the

the King can take advantage of the condition broken, and where not, 100,073

The difference and several uses of Offices by Commission under the Great Seal, and by Inquisition under the Exchequer Seal, 173

Oxford University.

Its Charters and Priviledges, 73,87,88

Paraphernalia.

WHat they be, and whether the Husband may dispose of them by his will, 343, 344,346,347.

Parceners, Vide Jeyntenants.

Pardons.

Exposition of a general Pardon, 349

Whether a general Pardon by Parliament shall discharge costs taxed after the Parliament, for offences committed before, 9,46,47,67,68, 193.

Whether it shall discharge costs in the Spiritual Court in a Suit for defamation, 160,193

Whether a general Pardon extends to Pluralities, 354,358

Whether the Kings Pardon, after a Sentence in the Star-Chamber, shall discharge the offences and all disabilities appointed by the Sentence, 55,56

To what things the Kings pardon by Parliament, of all offences before such a day, except for things depending by Bill, &c. shall extend unto, 67,68,176

Whether the Kings pardon by Parliament shall discharge Excommunication or Process of contempt, at the Suit of the party, 199

Where in a General pardon by Parliament, there be divers offences excepted; whether the Court shall allow and discharge the party, without pleading it, 449

Pardon granted in Manslaughter, that the party shall not find Sureties for his good behaviour, 597

Parish.

What shall be said such a Parish as may make taxation for their Poor, 92, 93,394,395.

Clerk of the Parish elected by the Vestry, 589

Parliament.

Seditious Acts and Conspiracies plotted in Parliament, may be punished out of Parliament in the Kings Bench, 181,182,209,210

Parson, Patron, and Ordinary, 354,355,357.

Parson, Patron, and Ordinary, before 13 *Eliz.* made a Lease for ninety nine years, there being a former Grant of the next avoidance. The Parson dies; the Grantee presents an Incumbent, who avoided the Lease: It is thereby totally avoided as to his Successors, 582

Whether an Obligation entred by the Parson to his Patron, to resign, be Simony, 180

Patents.

Where Letters Patents ought to be pleaded *sub Magno Sigillo Angliæ,* 469

Where Letters Patents name Lands by another name then when it came to the King, yet by a name whereby they are then known, *Quid inde operatur,* 168,169

Where the Kings Patents do not recite or misrecite a former Grant of the same thing; Whether it shall be void, or whether a *Non obstante* shall not help it, 197,198

Patents of the places of the Justices of the Kings Bench and Common Bench, how they vary from the Barons of the Exchequer, and how they shall be determined, 203

Whether there can be a Patent for *Oyer* and *Terminer* in Civil causes, 318

Juſtice of Peace by Patent; whether it may be, 223

Payment.

Where payment of damages to the Plaintiff ſhall be pleaded in a *Scire facias*, to have execution or reſtitution, 328
Where payment being againſt matter of Record, cannot be pleaded as a diſcharge, 328

Peer of the Realm.

What Execution ſhall be taken forth againſt him, who, hanging the Suit, is made a Peer of the Realm, 205, 206.
Whether he ſhall anſwer in the Star-Chamber, &c. upon his Oath or upon his Honour, 64
Sued by Proceſs to outlawry; what remedy he hath to ſtay it, 205,206
Vicount, of what antiquity, 136
There cannot be *poſſeſſio fratris* of a Barony, 601

Place.

In what Place and County every Action is to be brought, 143,183,184
Whether a Fine or Recovery may be by the name of a known place, out of any Vill or Hamlet, 269,276

Pleas and Pleadings.

What amounts only to a general Iſſue is not good, 157
Where adjudged ill for miſpriſion, 427,436,437
Where the pleading the performance of a Condition in the generality according to the words of the Condition, is good, 195
Where neceſſary circumſtances ſhall be intended in pleading, 160,186,195
How a Copyhold Eſtate ſhall be pleaded, 190
Statute Staple, how it ought to be pleaded, 363
Where the pleading of an *Exoneravit* without ſhewing how, ſhall be good 384
Pleading of the performance of Covenants, according to the Condition of the Obligation, where one of them is in the diſjunctive, is not good, 422
Pleading the Inducement to a Travers needs not be ſo preciſe as another Plea, 442
Of a Commiſſion by Letters Patents or Proclamation, and doth not ſay *ſub magno ſigillo*: Whether it be good, 461,180,181
Pleading of a Feoffment, and doth not ſay by Deed, and yet good, 482
A payment being againſt matter of Record cannot be pleaded as a diſcharge, 328
Where matter of Fact may be pleaded in diſcharge of a Record, 329
Eſtates determined need not be mentioned in pleading, 420,421,506
How a general pardon where divers offences are excepted, is to be pleaded, 449
Surrender *Dimiſſionis prædictæ*, and not of the Eſtate or Tenements, &c. Whether good pleading, 101
Vide tit. Payment.

Pledges.

Where Pledges *ad proſequendum* are omitted: Whether it ſhall be cauſe of ſtay, or to avoid the Judgment, 92,161,594
Whether money may be taken for Pledge, 446

Poſſibility.

Cannot be transferred over, 477
Limitation of an Eſtate upon a poſſibility after a poſſibility, is not good, 577

Poſſeſſio fratris.

Cannot be of a dignity, 601

Poſſeſſio ſororis, 87.

Præmunire.

Attainders therein, how they ſhall relate, 172

Prerogative, Vide King.

Prescription.

To have warren, how it ought to be pleaded, 311
That *per legem Terræ*, he ought to be discharged of the payment of tythes for wood spent in his house for firing, or for Fences, is not good, 113
Where it lies for Inhabitants or Occupiers of Land, 418,419
Where Prescription ought not to be personal, but in the thing prescribed, 325,326,419
Prescription against a Prescription cannot be, but the one ought to be traversed and put in Issue, 432
Prescription *de non Decimando* of Lands in the hands of the King or Spiritual person; If they come to a Lay-man, the Prescription is determined. And so where a Spiritual person hath a discharge by priviledge, 94

Presentment to Churches.

By the King, under what Seal it ought to be, 99,100
Whether the presentation or vacancy be traversable in a *Quare impedit*, 61,62
Præsentatio ad Ecclesiam is always to be intended of a Parsonage, 74

Principal and Accessory.

Accessory ought not to be condemned, but where the Principal is attainted, 567

Prison and Prisoner.

Every place where one is restrained of his Liberty is a Prison, 210
Prison of the Kings Bench and Fleet, how they may be removed to other places, 210,466
Prisoners, how to be ordered, 14,466
Prisoner for Felony, where he shall have Counsel, and in what matters, 134,147,175,365
Vide plus tit. imprisonment.

Priviledges.

Of the Universities, 73,74,87,88
For Serjeants at Law, and their Servants, to be sued in the Common Bench, and not elsewhere, 84,485
For Atturneys and Clerks of the Courts, not to be pressed for Souldiers, 11
Not to bear Offices in their Parish, 389

Privity.

Where Actions shall be brought upon the privity of Contract, and where upon the privity of Estate, 143, 184,188.

Procedendo.

Granted into *London*, where the Action is maintainable, which lies not in the Kings Bench, 350,487

Process.

Where Process mis-sued, is aided by the Statute of Jeofails, 90
Subpœna, how it ought to be served, 540

Proclamations.

How they ought to be made and pleaded, 180,181

Prohibition.

What surmises shall be good in a Prohibition, to stay suit for Tythes, 393
For suit for Tythes of Forest Land purchased of the King, 94
To stay a suit for Tythe of Fish taken in Rivers and in the Sea, 264,339
To stay a suit for Tythe of young Trees planted in a Nursery upon purpose to be rooted up and sold to be planted in other Parishes, 526
To stay suit for Defamation, for matter suable at the Common Law, 110 201,285,309,340,456,457.
Where the Wife sues the Husband in the Spiritual Court *propter savitiam, &c.* 16,220

Whether

Whether grantable to ſtay a Suit in an Appeal for ſaving coſts, the principal cauſe being diſcharged by the Pardon, 46

To ſtay a Suit in the Eccleſiaſtical Court againſt an Adminiſtrator, to make diſtribution amongſt the Kindred, after Debts & Legacies paid, 62,63,194

Where the Chancellorſhip of a Biſhop is granted for life, and he queſtioned in the Eccleſiaſtical Court concerning his ability to exerciſe that Office, thereby to deprive him, A Prohibition was granted, 65

For ſuing in the Vicechancellors Court at *Oxford*, for temporal cauſes, 73, 88.

To ſtay a ſuit in the Spiritual Court for a Will of Goods and Lands, 94, 115,165,166,395,396,397.

Prohibition denied, becauſe the party who prayed it, had long and often before in that Suit, admitted the Juriſdiction of thoſe Eccleſiaſtical Courts, 97

Upon the Statute 23 *H.* 8. for ſuing out of the Dioceſs in the Prerogative Court for a Legacy, upon a Will proved there, 97,162

To the High-Commiſſioners, where they ſentence a cauſe after a general Pardon, or meddle with a cauſe not warranted by *primo Elizabethæ*, although it be in their Commiſſion, 113,114

Prohibition for two, if grantable where they ſeverally ſued in the Spiritual Court, 162

Where a Prohibition may be granted after conſultation upon the ſame Libel, 208

Where it may be granted upon a ſuit for a Mortuary, 238

If granted, and the party ſtill proſecutes his ſuit in the Spiritual Court, he ſhall pay damages and coſts for his contempt, 559

Where a Prohibition lies upon ſurmiſe That the Lands of the Monaſteries were diſcharged by the Statute of 31 *H.* 8. from payment of Tythes, 422,423,424,425

Whether a Prohibition lies for a thing done in *Ireland*, 264

Prohibition to ſtay a Suit in the Stannaries, 333

To the Court of the Marches of *Wales* 531,595,597

To the Court of Requeſts for ſuing there, where he was barred by the Common Law, or by the Statute of Limitations, 595,596

Property.

Whether the property of Timber Trees, cut down in the time of the Leſſee for life, belongs to the Leſſor or Leſſee, 274

In Creatures *feræ naturæ*, how to be claimed, 544,545,554

Proviſo.

Where a Proviſo in a Statute may be given in Evidence without pleading, &c. 315

How Proviſoes in Deeds are to be conſtrued, 128,129,183

Quare Impedit.

Whether the Incumbent, who comes in *pendente Brevi*, ſhall plead in bar, 105

What damages ſhall be recovered in a *Quare Impedit*, 145,175,342,348

Preſentation alledged and vacancy thereof by reſignation or death; Whether the preſentment or the manner of vacancy may be traverſed; and what matter is principally traverſable, 50,51,105,174,380, 586.

Whether a general Pardon extends to Pluralities, 354,355,356,357,358

The King may preſent to any Church which he hath in right of his Ward, either under the great Seal, or under the Seal of the Court of Wards, 99,100.

Whether a ſucceeding King may take advantage of a Lapſe incurred in the time of his Predeceſſor, 335,336

Quæ Eſtate.

Where it ought to be ſhewn, 54,575

Quod ei deforciat.

Whether it lies at the Common Law, 444,445
How it shall be brought in *Wales*, 178 179,262,310,311,444,445
Vide plus in tit. Writ.

Quo Warranto.

Where amendment shall be in a *Quo Warranto*, 144

Rasure of a Deed.

WHere it shall be determine the Interest passed thereby, 398, 993

Recognisance.

Pro Pace conservanda, how it ought to be taken, 390
For the good behaviour, what acts shall be breach thereof, 498,499
Recognisance by Bayl in the Common Bench, how it differs from the course of Bayl in the Kings Bench, 481

Record.

Whether a Record of the Kings Bench may be removed by *Cerciorari* into the Chancery, and sent by *Mittimus* into the other Courts to be executed or otherwise, 297,298
Whether a Record may be avoided by matter of *fayt*, 329
Where a Record for the prolixity of the pleadings therein was ill & the Clerk fined therefore, 164

Recovery.

Of damages in one Action where it shall be a barr in another Action, 35,36
Against an Infant by his Gardian, who vouches, *&c.* whether it shall bind the Infant, 307
Of the moyety of Land, is good for a third part, where he who suffered the Recovery had but a third part of the Land recovered, 110
Common Recovery against a Disseisee to an use, is good against him and his heirs, 388,389
Vide tit. Common Recovery.

Recusants and Papists, 10. 18, 504, 333

Relation.

How acts done in Term time, shall relate to the first day of the Term 102
To what time a general Pardon shall relate, 9
Whether a judgment acknowledged shall relate to the first day of the Term or to the *quarto die post*, 102
How Deeds inrolled shall be construed to have relation to make Acts good. 110,217,218,571,572
Relation of a *Liberate* to the Extent and return, 148, 149. 150
Of an Attainder in a *Premunire*; whether it shall be for the time of the offence, 172

Release.

Whether a Release shall be from the time where a *Nolle prosequi* is entred against the one Defendant, and Judgment is given against the other, 239,551
Release by a Covenantee, where it shall be a barr against the Assignee of a Covenant, the breach being after the Assignment, 503
Release by *Baron* of his Wifes Suit in the Spiritual Court for Defamation, is a good Release *quoad* the cost, but not *quoad* the Defamation, 222
Two Obligees joyntly and severally; one being sued and pleading, the Plaintiff enters a *Retraxit*: Whether this be a Release and discharge to the other, 551

Relief. Vide *Ward.*

Remainder.

Whether the Remainder of a Term may be limited after the death of the first Devise, without Issue then living; and whether it may be destroyed by the alienation of the first Devisee, 236

Remainder to the firſt Sonne, Tenant for life, who hath Iſſue, and to his heirs; and ſo to the ſecond Sonne, Remainder to his heirs: Whether the Fee veſts preſently, 364
Vide Reverſion.

Remitter.

Where it ſhall be eſtopped by a Warranty deſcended, 145

Rent.

Ought to be demanded, although there be an Obligation for the performance of all Covenants and payments, 76,77
Rent-charge for life ſuſpended by acceptance of a Leaſe for years of the Land, is again revived by ſurrender of the Leaſe, 101
Rent, chaged by Tenant for life, and confirm'd by him in remainder within age; how it ſhall enure and how binde, 103
Where rent is granted of 14 l. *per annum*, *Habendum* 7 l. from ſuch a time for 38 years, and the other 7l. from another time for 28 years: And if the ſaid 14 *l. per annum* be behind, *&c.* that he may diſtrain, *&c.* Whether this be one or ſeveral rents, 154
Where the LeſſeeCovenants to pay to his Leſſor and his heirs ſuch an annual ſumme; Whether this ſhall be accounted a rent reſerved, 207
Where in a Leaſe for years rent is covenanted to be paid to the Leſſor, his Heirs and Adminiſtrators: Whether it ſhall be paid to the Heirs and Executors, 207
Whether rent reſerved to one during the Term ſhall go to his Executors, 289
Reſervando & ſolvendo rent to the *Baron* and *Feme*, upon a Leaſe of Land of the *Baron*'s: Whether it ſhall be a good reſervation to the *Feme*, 288,289
Reſervation in a Leaſe of the ancient Rent, not mentioning what in certain, if it reſerves or excepts any part anciently demiſed, it makes it a void reſervation, 95,96
Rent Seck granted out of *Dale* payable at *Sale*, demand thereof at *Dale* is good, 508
Rent Seck granted, and 6 d. delivered in name of Seiſin thereof, good, 508
Aſſiſe brought of a rent ſeck, 508

Repleader.

Shall not be allowed where admiſſion, inſtitution and induction is pleaded and iſſue is joyned upon the admiſſion, and inſtitution, where it ought to have been upon the induction, 380

Replication.

Where a replication at large may be to a Barre at large, 384
Intendment ſhall not make a replication good, 80,94
If the replication be not good, yet if the Bar be ill in ſubſtance, Judgment ſhall be for the Plaintiff, 5
Where a replication ſhall be ill, becauſe he did not conclude his plea; *Et hoc petit, Quod inquiratur per patriam*, 164
Where there ought to be a ſpecial replication, 514

Repugnancie.

Where a repugnant clauſe to the premiſes ſhall be void, and ſhall not deſtroy the premiſes, 367
Where a Verdict ſhall be void, by reaſon of repugnancie, 495

Requeſt.

Where it ought to be alledged in an Aſſumpſit, 3+35,139
Where ſpecial requeſt ought to be alledged, 386
Where a man is bound to do a thing upon requeſt, or reaſonable requeſt, 299,300
Vid. tit: Demaund.

Receipt.

Where receipt ſhall be after receipt, and

and what shall be a Travers where cause of receipt is alledged 262, 263

Rescous Vid. *Execution.*

Reservation. Vid. *Rent.*

Respondes ouster.

Where it shall be awarded, 9,568.

Return.

What shall be a good return by the Sheriff in a *Scire facias* upon a recognisance against the Heir and *Terr-tenant*, 295,296,312,313
Upon an extent made after the death of the Conusee, 450,451,452,458, 459
Whether a return by the Sheriff of a *Venire facias*, by his name and addition, *Nuper Vicecomes* be good or no, 189,190,570
In an *Habeas Corpus*, the returning the cause of the commitment of the Prisoner ought to be certain, 133

Retraxit.

Two Obligees joyntly, and severally, one being sued, and pleading, the Plaintiff enters a *Retraxit*: Whether this be a release and discharge to the other, 551

Reversion.

Where a reversion only is granted, whether Lands in possession pass thereby, 400
Where the Lessor waives the possession, the reversion falls in *Esse*, before the Lessee for years enter, 110
Grant of a remainder or reversion to commence *in futuro* is not good, 548

Revocation.

What shall be said to be a revocation of a Will, 23,24
What shall be said to be a revocation of a former Deed, 472

Riots.

Judgment in a riot and rescous, 506,507

Scire facias.

IT cannot be upon a Judgment in any Court, but in that wherein it was given, although it be removed in Chancery by *Certiorari & Mandamus* by *Mittimus* out of the Kings Bench, 34
The first *Scire facias* upon a recognisance to have Execution, ought to be in the County where it was acknowledged, 313
Two *Scire facia*'s into two several Counties, although death be alledged in the one, it shall not prejudice the other, 518
Granted against the Administrator upon the recovery of a Debt against an Executor, who died intestate of a Debt of the Testators, 167
Whether *Scire facias* lies to have Execution, where the party taken in Execution by *Capias* Escapes and rescues himself, 240,255
To have Execution of a Judgment in Debt by the *Baron*, 208,227
Upon a reconusance of the Fathers against the Heir and *Terr-Tenant*; how it ought to be returned, 295 312,313
Brought to avoid a Patent of an Office upon cause of forfeiture, 491,492
Whether one claiming by a Conusor by fine, or other record, may maintain a Distress without a *Scire facias*, 598
No Writ of Error lies in the Exchequer Chamber upon a Judgment in a *Scire facias*, 286,300,464
Whether a *Scire facias* may issue against the Bayle, where no *Capias* is awarded against the Principal, 408
Brought for not paying a fine assessed upon him at the Justices Seat of the Forest, 409
Upon a Recognisance of the Good Behaviour, 498,499

Seal.

Where *ſub Magno Sigillo Angliæ* ought to be be pleaded either in Letters Patents or Proclamations, 180, 181,461
What things ſhall paſs under the Exchequer Seal, 513,528
What ſhall paſs under the Seal of the Court of Wards, 99,100
For Inſtitution and Induction, it needs be under the Epiſcopal Seal, 342

Seiſin.

Where in an Avowry Seiſin of the Rent ought to be alledged; and wherein it is only traverſable, 82, 83,84
Jury finding Seiſin of one Coparcener is a ſufficient finding for both, 521

Serjeants at Law.

Their manner of Creation, 1, 2, 3, 4, 67,85
Created, 12,71,84,197,567.584,600
Their Writ ought to be returnable at a day certain in Term, 3
Where they and their Servants ought to ſue and be ſued, 84
Serjeant and chief Juſtice, the ſame perſon ſworn the ſame day, 2
Chief Juſtice removed doth practiſe after as Serjeant at Law, 375

Servant.

Where in juſtification he ſhall be in a better condition than his Maſter, 447

Sheriff.

When he is to be choſen and nominated in the Exchequer, 13, 14,595
His Oath, by what Law, & how there may be an addition thereto, 25,26
Whether he ought to add his name of Officer to returns, 189, 190, 572, 573,595
Whether he may execute a Writ where himſelf is party, 416
If he arreſt one by *Capias*, and returns not the Writ at the day, it is a tortious arreſt. But not ſo in his Servant or Bayliff, 446,447
Upon eſcape of one in execution, it is at the parties election to ſue the Priſoner or the Sheriff, 109
How he ought to execute Judicial Writs, notwithſtanding the death of the Party, 450, 451,458,459
What fees he ought to take for ſerving Executions, 287
What Actions his Executors are ſubject unto, 539,540
Information againſt an Under-Sheriff for ſeveral foul miſdemeanors, 569

Ship-money, 524,601.

Symony.

What it is, & if it were an offence before the Statute of 31 *Eliz.* whereof the Common Law took any notice, 331, 351,361
Whether it be ſuch an offence as ſhall avoid an Aſſumpſit or Obligation, 337,351,361,425
Whether an Obligation entred by the Parſon to his Patron to reſigne, be Simony, 180

Souldiers.

Whether their departing from their Conductor without licence be Felony, 71
Clerks and Attorneys of the Courts at *Weſtminſter* ought not to be preſſed for Souldiers, 11

Solicitor.

Who may be a Solicitor, and whether he may take any fees, 160
Solicitor General, his annual fee, 376

Statute Staple.

How it ought to be pleaded, 363
The proceedings thereupon in Chancery, 451,452,458,459
Whether one who claims by a Conuſor by fine or other Record, may maintain a diſtreſs without a *Scire facias*, 598

Statutes.

How they are to be expounded, 34, 83,84,85,533
Where a Proviso in a Statute may be given in evidence without pleading, 315
Where a Statute mis-recited shall make the Declaration ill, 135, 136, 232, 233
Statutes of explanation must be construed only according to the words, and not with any equity or intendment, 34
Vid. tit. Damages.

Statute of *Merton* cap. 1. *of Dower*, 43
Statute 12 *Ed.* 1. *of Rutland of Quod ei deforceat*, 445
Statute of *Winton* 13 *Ed.* 1. *for Hue and Cry.* 26, 37, 41, 158, 197, 336, 379

Westm. 2 Anno 13. Reg. *Ed.* 1.

Westm. 2 cap. 1. *de Donis Contionalibus*, whether it extends to Copyhold, 43,533
Westm. 2 cap. 2. *of Pledges found upon Replevin*, 446,594
West. 2. cap. 3. *cui in vita*, 43
West. 2. cap. 4. *Quod ei deforceat*, 445
West. 2. cap. 20. *of Elegits*, 44
West. 2. cap. 46. *concerning casting down of Hedges, &c.* 280, 281, 439, 440, 580.

Statuta edita tempore Reg. *Ed.* 2.

Anno 12 *Ed.* 2. cap. 5. *of Return by Sheriffs*, 189
Anno 12 *Ed.* 2. *for Essoyns*, 341

Stat. edit. temp. Reg. *Ed.* 3.

Anno 4 *Ed.* 3. cap. 17. *of Actions by Executors*, 297
Anno 9 *Ed.* 3. cap. 3. *of apparance*, 564
Anno 18 *Ed.* 3. *of the Sheriffs Oath*, 26
Anno 25 *Ed.* 3. cap. 1. *concerning Lapse of Benefices*, 335, 336
Anno 25 *Ed.* 3. cap. 2. *of Treason*, 167 332, 333
Anno 25 *Ed.* 3. cap. 19. *for Execution against the Kings Debtors*,
Anno 31 *Ed.* 3. cap. 11. *concerning Administrators*, 106, 201
Anno 31 *Ed.* 3. cap. 17. *for the Sheriffs Turn*, 275
Anno 50 *Ed.* 3. cap. 46. *of Prohibitions*, 268

Stat. edit. temp. Reg. *Rich.* 2.

Anno 2 *Rich.* 2. cap. 5. *de Scandalo Magnatum*, 135, 136
Anno 15 *R.* 2. cap. 2. *of forcible Entries*, 486

Stat. edit. temp. Reg. *Hen.* 4.

Anno 2 *H.* 4. cap. 11. *of the Admiralty*, 296, 297, 603
Anno 11 *H.* 4. cap. 9. *of return of Jurors*, 134

Stat. edit. temp. Reg. *Hen.* 6.

Anno 8 *H.* 6. cap. 9. *of forcible Entries*, 201
Anno 8 *H.* 6. cap. 12. *of Feofayles*, 203, 278, 564
Anno 23 *H.* 6. cap. 10. *concerning Sheriffs and their Officers*, 287, 309, 438, 448, 449

Stat. edit. temp. Reg. *Ed.* 4.

Anno 1 *Ed.* 4. cap. 1. *concerning Fines and Amercements in Sheriffs Turns*, 275

Stat. edit. temp. Reg. *Hen.* 7.

Anno 3 *H.* 7. c. 1. *of the Star-Chamber*, 168
Anno 3 *H.* 7. cap. 2. *of carrying a Woman away against her will*, 483, 385, 488, 493
Anno 3 H. 7. cap. 10. *of Costs*, where the Defendant sueth a Writ of Error, 145, 401, 425, 590, 591
Anno 4 H. 7. cap. 24. *of Fines*, 175, 183, 194, 435.
Anno 7 H. 7. cap. 1. *of Souldiers*, 71. 72
Anno 11 H. 7. cap. 20. *of Joyntures*, 244

Stat.

Stat.edit.temp.Reg.*Hen.*8.

Anno 3 *H.* 8. cap. 1. *Soldiers*, 71, 72
Anno 7 *H.* 8. cap. 4. *for damage, and costs to the Avowant*, 498, 533, 534, 535
Anno 14 *H.* 8. cap. 5. *of Physicians*, 256, 257
Anno 21 *H.* 8. cap. 5. *of Administration and probate of Testaments*, 106, 201, 202
Anno 21 *H.* 8. c. 6. *of Mortuaries*, 238
Anno 21 *H.* 8. cap. 13, *of Pluralities*, 146, 354, 355, 356, 357, 428. 475. 476
Anno 21 *H.* 8. cap. 19. *for damages and costs to the Avowant*, 498, 533, 534, 542
Anno 23 *H.* 8. cap. 4. *for selling Beer*, *&c.* 112
Anno 23 *H.* 8. cap. 9. *for suing out of the Dioceſs*, 97, 162, 339
Anno 23 *H.* 8. cap. 15. *for costs upon Nonsuit*, 542
Anno 24. *H.* 8. cap. 5. *of Felons*, 544
Anno 26 *H.* 8. cap. 6. *upon Endictments in cases of Felonies, to be enquired of in adjoyning Counties*, 332
Anno 26 *H.* 8. cap. 13. *of forfeiture for Treason*, 427, 428, 429, 430
Anno 27 H. 8. cap. 10. *of Uses*, 44, 218
Anno 27 *H.* 8. cap. 16. *of Enrolments*, 109, 110, 217, 218
Anno 27 *H.* 8. cap. 28. *of Monasteries*, 422, 423, 424
Anno 31 *H.* 8. cap. 1. *of Joyntenants*, 44
Anno 31 *H.* 8. cap. 13. *of Monasteries to be discharged of Tythes*, 422, 423, 424
Anno 32 *H.* 8. cap. 1. *of disposing Land*, *&c.* 34
Anno 32 *H.* 8. cap. 2. *of Limitations*, 81
Anno 32 *H.* 8. cap. 9. *of Champerty*, 43, 232
Anno 32 *H.* 8. *of Assignees.* 24
Anno 32 *H.* 8. cap. 28. *Leases*, *&c.* 22, 23, 44, 158
Anno 32 *H.* 8. cap. 30. *of Feofayls*, 90, 278, 281
Anno 32 *H.* 8. cap. 32 *of partition betwixt Joyntenants and Tenants, in Common*, 43
Anno 32 *H.* 8. cap. 34. *of Grantees of Reversion.* 44
Anno 32 *H.* 8. cap. 36. *of Fines to bar the Issue in Taile*, 435
Anno 32 *H.* 8. cap. 37. *for Executors to recover Rents*, *&c.* 471, 472
Anno 33 *H.* 8. cap. 1. *for false tokens*, 564
Anno 33 *H.* 8. cap. 20. *Forfeiture in Treason*, 427, 428, 429, 430
Anno 34 *H.* 8. *of Wales.* 171, 595
Anno 34 *H.* 8. cap. 8. *of Physicians and Chyrurgeons*, 256, 257
Anno 34 *H.* 8. cap. 26. *of Wales*, 342
Anno 37 *H.* 8. cap. 17. *Doctors of Law*, *&c.* 258, 259

Stat.edit.temp.Reg.*Ed.*6.

Anno 1 *Ed.* 6. cap. 7. *of Discontinuance of Proceſs*, 104
Anno 1 *Ed.* 6. cap. 14. *of Chanteries*, 81, 148, 249, 455, 456
Anno 2 *Ed.* 6. cap. 13. *for not setting out Tythes*, 513
Anno 2 *Ed.* 6. cap. 13. *Tythes of barren Heath*, 208
Anno 5 *Ed.* 6. cap. 4. *for striking in Church*, 464, 465
Anno 5 *Ed.* 6. cap. 14. *of Ingrossers, Forestallers, &c.* 231, 314, 315
Anno 5 *Ed.* 6. cap. 15. *of Curriers*, 588

Stat. edit.temp.Reg. *Mariæ.*

Anno 1 *Mar.* cap. 9. *of Physicians*, 256, 257
Anno 1 & 2 *Phil.* & *Mar.* cap. 12 *of Distresses impounded*, 561
Anno 4 & 5 *Phil.* & *Mar.* cap. 3. *for taking a Maid*, *&c.* 465

Stat.edit.temp.Reginæ *Eliz.*

Anno 1 *Eliz. concerning the High-Commission*, 113, 114, 220, 222
Anno 1 *Eliz.* cap. 19. *of Leases and Grants by Bishops*, 16, 17, 47, 48, 49 50, 95, 96, 258, 279, 280, 556, 557
Anno 5 *Eliz.* cap. 4. *for using a Trade not being Apprentice*, *&c.* 316, 347, 499, 516, 517.
Anno 5 *Eliz.* cap. 4. *for binding out Apprentices*, 179
Anno 5 *Eliz.* cap. 9. *for perjury*, 99, 353, 354.

Anno

Anno 5 *Eliz.* cap. 9. *for witnesses ad testificandum*, 522,523,540,541
Anno 5 *Eliz.* cap. 22. *concerning Leather*, 588
Anno 5 *Eliz.* cap. 23. *de Excommunicato capiendo*, 583
Anno 13 *Eliz.* cap. 7. *for Bankrupts*, 149, 568, 569
Anno 13 *Eliz.* cap 10. *of Leases by Spiritual persons.*
Anno 18 *Eliz.* cap. 3. *of Bastards*, 341, 350, 351, 436, 470, 471
Anno 18 *Eliz.* cap. 13. *of Amendments*, 92, 203, 223, 278, 282
Anno 27 *Eliz.* cap. 5. *of Demurrers*, 185
Anno 27 *Eliz.* cap. 8. *of Errors in the Exchequer Chamber*, 142, 286, 300 464, 514.
Anno 27 *Eliz.* cap. 13. *of Hue and Cry*, 26, 37, 38, 40, 212, 213
Anno 27 *Eliz.* cap. 16. *of Curriers.* 588
Anno 29 *Eliz.* cap. 4. *for the Sheriffs fees upon Executions*, 287
Anno 31 *Eliz.* cap. 6. *of Simony*, 330, 331, 425
Anno 35 *Eliz.* cap. 2. *of Popish Recusants*,
Anno 39 *Eliz.* cap. 15. *for Robbing in a dwelling house*, 473, 474
Anno 43 *Eliz.* cap. 2. *of Overseers for the Poor*, 92, 93, 394, 395
Anno 43 *Eliz.* cap. 4. *of Charitable uses*, 40, 525, 526

Statuta edita tempore Regis *Jacobi.*

Anno 1 *Jac.* cap. 11. *for marrying a second husband, the first living*, 461, 462, 463
Anno 1 *Jac.* cap. 12. *of Witchcraft*, 141
Anno 1 *Jac.* cap. 22. *of Curriers*, 588 589
Anno 3 *Jac.* cap. 4. *of Popish Recusants*, 504
Anno 3 *Jac.* cap. 8. *of Supersedeas upon a Writ of Error*, 59
Anno 3 *Jac.* c. 15. *for relief of the Poor*, 572
Anno 4. *Jac.* cap. 3. *for Costs to Defendants*, 29
Anno 7 *Jac.* cap. 5. *for double Costs to Officers*, 175, 219, 285, 286, 467
Anno 21 *Jac.* cap. 4. *of Informations*, 112, 146, 316
Anno 21 *Jac.* cap. 13. *of Feofayles*, 92, 203, 204, 278, 312, 313, 480, 564
Anno 21 *Jac.* cap. 16. *of Limitation of Actions*, 115, 139, 145, 163, 294 295, 381, 405, 513.
Anno 21 *Jac.* cap. 16 *for Costs in Action forwards*, 163, 307
Anno 21 *Jac.* cap. 19. *of Bankrupts*, 149, 185, 188, 190, 549, 550, 568 569.
Anno 21 *Jac.* cap. 23. *for Utter-Barristers to be Stewards*, 79
Anno 21 *Jac.* cap. *for tendring damages in Trespass* 264
Anno 21 *Jac.* *of Supersedeas, &c.* 487

Statuta edita tempore Regis *Caroli.*

Anno 3 *Car.* cap. 4. *concerning provision for Bastard Children*, 341, 350, 351, 436, 470, 471.

Suggestion.

In a prohibition shall be tryed by two witnesses, 208

Summons & severance.

Of one Executor, the other proceeds and recovers: Whether mention need be made of him who is summoned and severed, &c, 420, 421

Sunday.

Process served upon it punished, *&c.* 602

Supersedeas.

To a *Procedendo*; where it is misawarded and well allowable, notwithstanding the Statute of 21 *Jac.* 487
Awarded to an inferiour Court, because their proceedings were not before an Utter-Barrister, 79

Superstitious uses, 248, 249, 455, 456

Surrender.

What shall be a surrender, and how to be pleaded, 101, 102
If a Patentee for life or years of the King,

King of Land or Office, takes a new Leaſe or Patent thereof, for another Eſtate; whether it be a ſurrender, 197,198
By a Copyholder for life, to the uſe of another, to whom the Lord granteth it for his life; He dies: Whether the firſt Copyholder ſhall have the Land back again as the remnant of the Eſtate in poſſibility remaining in him, 204,205
Surrender *Dimiſſionis prædictæ*, & not of the Eſtate or Tenements, *&c.* Whether good pleading, 101
Grantee of a Rent for life accepts of a leaſe for years of part of the ſame Land, and ſurrenders the ſaid Leaſe: Whether the rent remains ſuſpended during the years, or be revived preſently by a ſurrender, 101, 102
Vide Copyholds,

Tayle.

What ſhall make an Eſtate Tayle, 22
Whether it ſhall be by a Deviſe to a brother and his heirs; and for default of ſuch heirs, to his ſiſter and her heirs, 57,58
How an Eſtate tayle in the King may be barred, 96,97
Habendum to *Baron* and *Feme*, to the uſe of them and the heirs of their bodies; Whether it be an Eſtate Tayle or for life only, 230,231,245
Where an Eſtate tayle is barred by Fine: Whether it may be revived by confirmation of him who hath the Fee, 478,
Vid. tit. Tenant.

Tales.

De circumſtantibus; where it ſhall be, 341
Tales by *Proviſo* for the Defendant cannot bee in the ſame Term that the Jurors make default, 484

Tenant.

Tenant in Tayle, Reverſion to the King, makes a Feoffment, and after is attainted of Treaſon: Whether the Eſtate or right of the Tayle is forfeited by the Statutes of 26 *H.* 8. and 33 *H.* 8. 427,428,429,430
Tenant in Common may be by a Device to three, their Heirs and Aſſignes, part and part-like, 75
Tenant at Will makes a Leaſe for years, rendring rent; The Leſſee enters and pays the Rent; whether the Leſſee be in as Leſſee or Diſſeiſor, 302,303
Vid. tit. Tayle.

Tender.

Whether tender of a Rent ought to be demanded, where one is obliged to perform all Covenants & payments in a Leaſe, 76
When and where tender of amends for Treſpaſs by the Statute of 21 *Jac.* is to be made, 264
Whether Traverſe ſhall be of the tender of a Marriage *in valore Maritagii*, or in an Action of the Caſe in nature thereof, 503

Term.

For what purpoſe the Term ſhall be ſaid to begin the firſt day and when upon the *quarto die Poſt*, 14. 102
Term adjourned unto *Reading*, 13
Vide tit. Adjournment.

Teſtament

Rules concerning expoſition of Teſtaments, 51, 52, 369
By whom a Teſtament or will may be made, and how revoked, 51, 52. 161. 198
Where the Teſtament of a *Feme Covert* ſhall be good, 26,219,220
Feoffment to ſuch uſes as ſhall be declared by his Will; He deviſeth the Land as a declaration of the uſes: Whether it ſhall enure as a declaration of the Land it ſelf, 39
Probate of Teſtaments, where to be made, 395,396,397.
Vide tit. Deviſes & Prohibition.

Teſte.

Teſte.

How the *Teſte* of Writs Judicial ſhall be made upon the death of the chief Juſtice, 393

Time.

What time one ſhall have where he is bound to do a thing after requeſt or reaſonable requeſt, 299
To make a thing parcel in reputation, what time is required, 169,308
It is not material, that the time of diſturbance ſhould be alledged in a Declaration, when it is but collateral to the promiſe, 497

Title.

What ſhall be a ſufficient title in a Declaration to a Water-courſe, 499,500

Traverſe.

Where it ſhall be to the manner of vacancy alledged in a *Quare Impedit*: and what matter is principally traverſable, 61,62,105,586
Whether if it be taken where it ought not to be, it makes not the Plea double or ill; and where it ought to be ſpecially alledged upon a demurrer, 61,62,105
Where the taking a traverſe may be perillous, 324,328
Where, & in what Caſes there may be a Traverſe upon a Traverſe, 105,586
Where a Traverſe ſhall or ought to be to the matter to induce a Traverſe, 174
Inducement to a Traverſe ſhall not be ſo preciſely pleaded as another Plea, 442
Whether the inducement thereunto ought alwaies to be ſufficient in matter, 266,336
Whether Travers ought to be a ſpecial cauſe of Receipt, 226
Where there is no abſolute confeſſing and avoiding there ought to be a Traverſe,
Where the Traverſe of the day ſhall make the plea ill, 501
Whether the Traverſe ſhall be of the tender of a Marriage *in valore Maritagii*, or in an Action upon the Caſe in nature thereof, 503
Where the Defendant makes title by a later Grant from the ſame party, there the Plaintiff needs not traverſe it, 581

Treaſon.

To go in a Warlike manner with a multitude, to aſſault a privy Counſellor at his houſe, is Treaſon, 583
The breaking, of a Priſon wherein Traitors are in durance, and cauſing them to eſcape is Treaſon, although the parties did not know there were any Traytors there, 583
There is nothing Treaſon at this day but what is made ſo by the Statute 25 *Ed.* 3. 117.333
No words are Treaſon unleſs made ſo by ſome particular Statute,
Judgment in Treaſon for ſpeaking traiterous words againſt the King, 333
Judgment in Treaſon for Counterfeiting money, 383
Petit Treaſon in the wife to murder her husband, and Judgment thereupon, 531,532

Treſpaſs.

Whether Action of Treſpaſs lies where Bayl ſufficient is tendred to a Serjeant upon an Arreſt upon a Plaint in *London*, and he refuſe to accept thereof, 196
It is no plea in Treſpaſs for cutting his Nets and Oares, That he cut them, becauſe he found the Plaintiff fiſhing with them in his Waters, 228
For killing an Hawk, without ſhewing what kind of Hawk it was, and that ſhe was reclaimed; whether good, 18
Treſpaſs, for fiſhing *in ſeperali Piſcaria ſua*, and taking *Piſces ſuos ibidem*, 554
Treſpaſs of Aſſault and Battery 2 *Julii*: The Defendant juſtifies *en ſon defence* 9 *Julii*, 514,515

In another place, &c. 572,573
Vide tit. Action.

Tryal.

A fact in one County cannot be tryed in another, 247
Whether upon Endictments traverſed tryal may be the ſame day or Seſſions, 315,340,438,448
Tryal of a Priſoner by virtue of a Commiſſion of *Oyer* and *Terminer*, without any Commiſſion of Gaol-delivery, may be the ſame day of the Inquiry, 583
Where tryal may be in an Engliſh County adjudged for a fact committed in *Wales*, 245,248
Upon a Record of *Niſi prius* varying in ſubſtance from the Plea, Roll, the Tryal is meerly void, 20,21,194
Trial of an Iſſue upon a *Niſi prius* Roll where there is a miſpriſion of the Jurats; Whether it be good or amendable, 275
Tryal by ten of the principal Panel and two of the *Tales*, where there were but 23. in the *Venire facias* returned: Whether it be good, or is aided by any of the Statutes, 223, 224
Where twenty three only are returned in the *Venire facias*, and in the *Habeas Corpora* twenty four are named and returned, and the twenty fourth Juror ſworn; whether it be good, or aided by the Statutes, 278
Trial of an Iſſue by ſix Jurors is not good, although alledged to have been uſed ſo by Cuſtome, 260
Whether the tryal of Sheriff or no Sheriff ſuch a day, when Proceſs was returned, ſhall be by the Patent ſhewn, or *per Pais*, 421
Cuſtome of *London* which concerns all the Citizens, ſhall be tryed *per Pais*, 517
Tryal of Inſtitution ſhall be by the Biſhop; Of Induction *per Pais*, 380
Where there may be Trial in the Spiritual Court of a Releaſe or other matter tryable by the courſe of the Common Law, and where not, 237, 238

Trover and Converſion.

Where the day and place of the *Trover* ought to be mentioned, 262, 525
Vide tit. Action.

Turn de Viſcount.

What time it ſhall be held, & how the Amercements ſhall be levied, 275, 276
Vide Amercement.

Timber.

What ſhall be ſaid to be Tymber-trees, 531
Vide tit. Waſte.

Tythes.

What ſhall be good cauſe of diſcharge of Tythes, 393
Whether tythes ſhall be paid of Foreſt Lands in the hands of the Kings purchaſors, which were ever diſcharged of Tythes in the Kings hands, 94
Whether Tythe ſhall be paid for Abby Lands diſſolved by the Statute 27 *H.* 8. 422,423,424
What ſhall be called *Minuta Decima*, 28
VVhether Tithe ſhall be paid for Houſes in *London*, 596
VVhether an *Ejectione firmæ* lies for Tythes, 301
VVhether they be within the Statute of 8 *H.* 6. to have reſtitution, 201
Tythes are payable for firewood, or wood for fences, unleſs there be a ſpecial cuſtome to diſcharge them, 113
VVhether Tythe ſhall be paid for the Paſturage of ſheep fed to be ſpent in an houſe within the Pariſh, 237
VVhether Tythe ſhall be paid for Fiſh taken in the Sea or great Rivers, 264,339
VVhether for Conies taken in a Warren, 339
VVhether for young Trees planted in a Nurſery upon purpoſe to be rooted up and ſold, 522

VVhether

VVhether Tythe shall be paid for Hony, 560
VVhether it shall be paid of the Bees themselves, 404

Variance.

BEtwixt the VVrit or Bill and the Count, where it shall be aided by the Statute of Jeofayls, and where not, 272,281,282 325
Betwixt the Count and the Indenture pleaded, where it makes the Judgment erronious, 314,418

Venire Facias.

Of what place, and how it shall be, 17,150,162.480
Bearing date before the Action brought, and yet the Tryal thereupon good, 38,90,91
VVith the *Teste* or day of return, varying from the Roll, and before the *Teste* of the VVrit, and the Issue tried thereupon, VVhether amendable 38,203,204
Venire facias de novo awarded. VVhere the Trial is upon a Record of *Nisi prius* varying from the Roll; although the Plaintiff be non-suited, 203,204
VVhere *Venire facias de novo* shall be awarded, 284,312
VVhether a *Venire facias* may be from the Ward of a City, 150,164,165
Venire facias against two, where the one is dead, After Issue and Tryal thereupon, VVhether the Judgment against the Survivor be good, 426
Where in a *Venire facias Summonitus est* was returned, where it ought to have been *Attachiatus est*; Whether good, 91
Appeal by the Sonne and Heir of the death of his Father against two, That the one *proditorie*, the other *felonice* conspired his death; Whether there ought to be one or several *Venire facia*'s for the Tryal thereof, 532

Vid. tit. Trial.

Verdict.

If it do find matter varying from the Declaration; Where it shall hurt the Declaration, and where not, 151
Where it shall make an ill Plea or Issue good, 6,152,153,168,191
Verdict general as the Plea is good, and not void for incertainty, 219
Verdict special not finding the Plaintiffs title, and yet good, 22
Verdict finding the Issue precisely for the Plaintiff or Defendant, and new matter contrary to it, is good according to the Issue, and void for the Surplusage found 130,131, 198,212
Verdict find damages 20 l. (to be paid in such a Commodity, if by Law it may be) it is a good Verdict for the damages found, and void for the residue, 219
Verdict, where void by reason of repugnancy, 495
Upon a Writ of Enquiry of Waste, it finds that he made Waste in less quantity, and doth not find, *Quod nullum aliud fecit Vastum*; Whether it be good, 414,453
That the Defendant *assumpsit*, where there be two several promises alledged; Whether it be good, 219
Where it gives all in damages in an Assise, for six years arrearages of a Rent-seck, not mentioning it to be for arrearages, and yet shall be good,
That the Church is void *per tempus semestre*, although it finds not the time of the avoidance, is good, 343
Obligation with a Condition to pay upon the 31 of *September*: Payment is pleaded to be at that day: And the Verdict finds, There was no payment the said 31 of *September*, yet a good Verdict, 78
Verdict certainly given and uncertainly returned, how it may be amended, 338
After Verdict matter of form shall not be prejudicial, 90,91
Where two contrary Verdicts be given, the first cannot be avoided, unless

leſs by Error or Attaint, 590
Vide tit. Venire facias and *Judgment.*

Vi & Armis.

Where the omiſſion of thoſe words in Endictments and Declarations will make them vitious, 378,407

Vicar.

Of what things he ſhall have Tythes, as *minutæ Decimæ*, 28

Victuals and Victuallers.

What ſhall be ſaid to be Victuals, and who Victuallers, *&c.* 113,231,232

Vill.

Vill and Pariſh ſhall be intended all one and the ſame, if the contrary appears not, 182
Vide tit. Fine.

Unity of Poſſeſſion.

Where and what things it ſhall extinguiſh, 419

Voucher.

Whether one may vouch the King with a Voucher over, 96,97
Vide tit Enfant.

Uſes.

Where the limitation of the uſes ſhall be for the limitation of the Eſtate; And where it ſhall be conſtrued larger then the Eſtate, 230
Uſes limited upon recovery, which is good by *Eſtoppel*, ſhall bind the Recoveree and his heirs, and all claiming under him, 389
Uſes contingent, by what Acts they may be deſtroyed, 102, 103
Who ſhall have the benefit of contingent uſes, and by what Acts they may be transferred, ſuſpended or deſtroyed, 359
Uſes raiſed upon conſideration of blood, 529,530

Uſury.

What ſhall be ſaid Uſury within the Statutes, 283
It ſhall not be Uſury where the agreement is not corrupt, 501
Permitted to be paid, if it exceeds not that which is allowed by the Statutes, 273,491

Utlawry.

Reverſed by Plea; Whether it be within the Statute of 21 *Jac. of Limitations*, 194,195
Whether the Utlawry of a Juror ſhall be good cauſe to diſcharge an Endictment, 147
Where the Defendant after imparlance pleads Outlawry, and upon *Nul tiel Record* pleaded, fails of the Record, Judgment ſhall be abſolutly given, and not a *Reſpondes ouſter*, 566

Wager of Law.

WHere it lies, 187
In inferiour Courts it is not allowed, 112

Wales.

Whether a *Certiorari* lies to remove a Record or Endictment there found, 34,331,332
Where Judgment is given in Debt againſt a Defendant in *Wales*, who dieth inteſtate, and one here takes Letters of Adminiſtration: Whether any Execution may be in *Wales*, 34
Whether a Writ of Appeal may be brought in the next Engliſh County, for a Murder in *Wales*, 247,248
Whether the Courts in *Wales* might write to the Archbiſhop or Biſhops in *England*, to certifie Baſtardy, Matrimony, *&c.* 247,342
How Proceſs are there returnable from day to day, and not confined to fifteen dayes betwixt the *Teſte* and return, 179,254

They

They have Jurisdiction to hold Plea of Lands not held of the King, 172
Trials may be there made in some places by six Jurors only, 260
Customes in *Wales*, 171, 172, 231, 238, 247, 248, 254, 260, 332, 342, 344, 562, 570.
Vide tit. Court of the Marches.

Ward and Wardship.

Whether a distress be maintainable for relief, or *pro valore Maritagii*, 533, 534
Whether the Heir shall pay relief to other Lords at his full age, where his Land had been in Ward to the King, by reason of other Lands held *in capite*, 534
Vide Quare impedit.

Warranty.

Where Warranty descended and attached upon the heir in Remainder is defeated by the entry of the Tenant for life, who is not bound: Whether it be defeated *quoad* the heir, 145
Where Warranty shall be said to be collateral, and where it shall bar him who had right before, 156
Where it is determined by the returning of the Fee to the Feoffor, 305, 369
Whether Warranty upon a Feoffment to the use of the Feoffee for his life, Remainder for life, and after to the Feoffor and his heirs, shall bind for the benefit of him in remainder, 369, 370, 371
What shall be said to be a Warranty commencing by Disseisin, 370, 433, 484
Where found by special Verdict, although not pleaded, yet shall bind, 145
How the recovery in value shall be in a Warranty against the King, and how he shall recover over in value, 96, 97

Warren.

Waste.

Whether the Assignee of the Lessor shall have Action of Waste for cutting down Timber trees during the Lease for years, 242, 243
Wherein Waste alledged *in Domibus Gardinis & Pomariis*, and a Writ of Inquiry of Waste awarded, the Jury finding the Waste in cutting down two trees, where the Waste was assigned in cutting down twenty trees, and they do not find *Quod ullum aliud fecit Vastum*; whether it be good, 453
What judgment shall be given upon a *Venire facias* in Waste, where several Issues be joyned, and the Verdict is found in part for the Plaintiff and part against him, 381
If in a writ of Inquiry of waste there be more then twelve sworn; whether it be erronious, 414
Vide tit. Writ.

Waver de Action.

The King may wave a Demurrer or Issue, but not any other against the King, without the Atturney Generals consent, 347
Whether the Plaintiff in an Action of Waste brought for the cutting down and carrying away of a Timber Tree may wave that Action and bring an Action of *Trover*, 242, 243

Wayes.

Whether the erecting of a Gate upon the High-way to open and shut with the hand be a Nusance, 184, 185
Who ought to repair High-wayes, 336

Wife. Vide *Baron and Feme, and Feme sole.*

Wills. Vide *Testament, & Devise.*

Witnesses.

Ad testificandum make default, 522 523, 540, 541
Perjured, 99

Words.

No words are treasonable, unless made to

ſo by ſome Statute, 125
Of ſuch words as are not uſual the Law doth not take any conuſance, 554,555
Vid. tit. Action ſur Caſe, & Expoſition.

Woad and Weld.

Whether *Minutæ decimæ.* 28

Writ.

The Regiſter is the Rule of original Writs, but Judicial writs may be framed according to the direction and diſcretion of the Court, 527
Where it ſhall be awarded to the Coroners, where the Sheriff is Plaintiff or Defendant, 415,416
Writ of Right of Advowſon, the manner of proceedings therein, 511, 574,589,590,591.592
Writ of *Quod ei deforceat*, where it may be general and count ſpecial in what Action he will, 444,445
Writ demanding 15. *acr. Jampn. & Bruerie*: whether it be incertain, 179
Writ of Enquiry of waſte is not a meer Inqueſt of Office, but in nature of a Verdict; whereof an Attaint lies, 414,
Writ to enquire of the preſerving of Encloſures; How and in what Caſes it ſhall be, 280, 281, 439, 440
Writ to certifie, That J. S. is a Baron, and that Proceſs ſhould not be awarded againſt him, but as againſt a Peer of the Realm, 205,206
Writ awarded to a Biſhop out of *Wales*; and whether it may be to the Archbiſhop, 342
Writ of Reſtitution awarded upon an *Ejectione firmæ* for Tythes, 201
Awarded to the Eccleſiaſtical Court, for the admitting and ſwearing of a Churchwarden,
For the admitting and ſwearing of the Clerk of a Pariſh, 589
Writ of Priviledge, to diſcharge an Attorney or Clerk of the Court from being preſſed for a Soldier 11
From being Conſtable, *&c.* 389
Writ of Priviledge for Serjeants at Law, and their Servants, to be ſued only in the Common Bench. 84,85
Writ of *Diſtringas Villata circumadjacent. ad levand. Sepes, &c.* upon the Statute of 13 *Ed.* 1. 280, 281, 439,440,580.

* τίωργος. *Jamq; noſter* * Agricola, *Poſteritati narratus & traditus, ſuperſtes erit.*

Tac. in vita Julii Agricolæ, Socri ſui.

In

In the years when these Cases were adjudged, these persons were Keepers of the Great Seal, Justices of both Benches, and Barons of the Exchequer.

Keepers of the Great Seal.

Anno 1 Car. Reg. *At the beginning of this Reign,* John Williams, *Bishop of* Lincoln, *was Keeper of the Great-Seal.*

Upon the 27 *day of* Oct. *following, the said Bishop was discharged of that place. And upon the* 30 *of the same month Sir* Thom. Coventry *Knight, the Kings Attorney, was made Keeper of the Great Seal.* Ante 13. Ibid.

Anno 15 Car. Reg. *Upon the* 14. *of* January, *the said Sir* Thomas Coventry *departed this life: And upon the* 18 *day thereof Sir* John Fynch, *chief Justice of the Common Bench, was made Keeper of the Great Seal.* Ante 565.

Anno 16 Car. Reg. *Upon the* 19 *day of* January *Sir* Edward Littleton, *chief Justice of the Common Bench was made and sworn Keeper of the Great Seal, in the place of Sir* John Fynch. Ant. 600.

Justices of the Kings Bench.

Anno 1 Car. Reg. *Sir* Randolph Crew, *chief Justice,* *Sir* John Doderidge, *Sir* William Jones, *Sir* James Whitlock, } *Knights.*

Anno

Ante 52. Anno 2 Car. Reg. *In Mich. Term, Sir* Randolph Crew *was amoved from his place: And in Hillary Term following, Sir* Nicho. Hide

Ante 65. *Knight, was made chief Justice.*

Ante 127. Anno 4 Car. Reg. *Upon the* 11 *of* September, *Sir* John Doderidge *died: And upon the* 9. *of* October *following, Sir* George Croke

Ibid. *was removed from the Common Bench, and made one of the Justices of the Kings Bench.*

Ante 225. Anno 7 Car. Reg. *In the Summer Vacation,* viz. 25 August *Sir* Nicholas Hide *died: And in Michaelmas Term following,* viz. 24

Ibid. Octob. *Sir* Thomas Richardson, *chief Justice of the Common Bench, was sworn chief Justice.*

Ant. 268. Anno 8 Car. Reg. *Sir* James Whitlock *died in the Summer Vacation: And in Mich. Term following, Sir* Ro. Berkeley *Knight,*

Ibid. *and the Kings Serjeant, was sworn one of the Justices of the Kings Bench.*

Ant. 393. Anno 10 Car. Reg. *In the Michaelmas Vacation, Sir* Thomas Richardson *died: And,*

Ant. 403. Anno 11 Car. Reg Terme Pasch. *Sir* John Brampston *Knight was made chief Justice.*

Ant. 600. Anno 16 Car. Reg. *Upon the* 9. *of* Decemb. *Sir* William Jones *died: And in Hillary Term following, Sir* Robert Heath *was sworn one of the Justices of that Court.*

Justices of the Common Bench.

Anno 1 Car. Reg. { *Sir* Henry Hobert *Knight & Baronet, chief Justice.*
Sir Richard Hutton, *Sir* Francis Harvey, *Sir* George Croke, *Sir* Henry Yelverton, } *Knights.*

Anno

Anno 1 Car. Reg. *In Michaelmas Vacation, Sir* Henry Hobert *died: And,* Ante 28.

Anno 2 Car. Reg. *Upon the laſt day of Michaelmas Term, Sir* Thomas Richardſon *Knight, and Serjeant at Law was made chief Juſtice of the Common Bench.* Ante 56.

Anno 4 Car. Reg. Term. Mich. *Sir* George Croke *advanced to be Juſtice of the Kings Bench,* ut ſupra. Ante 127.

Anno 5 Car. Reg. Term. Hilarii, *Sir* Henry Yelverton *died: And* Octabis Purificationis *following, Sir* Humphry Davenport *Knight, was made one of the Juſtices of the Common Bench.*

Anno 7 Car. Reg. Term. Paſch. *Sir* Humphry Davenport *was made chief Baron of the Exchequer: And in* Quindena *of the ſame Term, Sir* George Vernon *was removed from being one of the Barons in the Exchequer, to be one of the Juſtices of the Common Bench.* Ant. 211. Ibid.

In eodem anno, Term. Mich. *Sir* Thomas Richardſon *advanced to be chief Juſtice,* ut ſupra: *And the ſame Term,* viz. 27 Octob. *Sir* Robert Heath *Knight, was made chief Juſtice of the Common Bench.* Ant. 225. Ibid. Ant. 268.

Anno 8 Car. Reg. *Sir* Francis Harvy *died in the Summer Vacation: And in the Michaelmas Term following,* Fran. Crawley, *the Queens Serjeant at Law, was made one of the Juſtices, &c.* Ibid.

Anno 10 Car. Reg. *In the Summer Vacation,* viz. 14 September, *Sir* Rob. Heath *was diſcharged of his place: And in* tres Michaelis *following, Sir* J. Fynch *Knight, of the Kings learned Counſel and Attorney to the Queen, was made chief Juſtice of that Court.* Ante 375. Ibid.

Ante 537. Anno 14 Car. Reg. *In* Hillary *Vacation, Sir* Richard Hutton *departed this life.*

Ibid. Anno 15 Car. Reg. In Menſ. Paſch. Edmond Reve *Serjeant at Law was ſworn one of the Juſtices of the Common Bench.*

Ant. 565. In eodem Anno, *Sir* George Vernon *died in the Michaelmas Vacation: And in the Hillary Term following,* Robert Foſter *Serjeant at Law, was ſworn Juſtice of the*

Ant 561. 8. *Common Bench.*

Ant. 565. In eiſdem Anno & Termino, *Sir* John Fynch *was made Keeper of the Great Seal,* ut ſupra: *And Sir* Edward Littleton *Knight, Solici-*

Ant. 567. 8. *tor General, was then made chief Juſtice of the Common Bench.*

Ant. 600. Anno 16 Car. Reg. Term. Hillarii, *Sir* Ed. Littleton *was made Keeper,* ut ſupra: *And the ſame Term, Sir* John Banks *Knight, Attorney General, was made chief Ju-*

Ibid. *ſtice of the Common Bench.*

Barons of the Exchequer.

Anno 1 Car Regis, { *Sir* Joh. Walter *chief Baron,* / *Sir* Edward Bromley, / *Sir* John Denham, / *Sir* Thomas Trover, } *Kts.*

Ante 85. Anno 3 Car. Reg. *Sir* Edward Bromley *died in the Summer Vacation: And in* Termino Michaelis *following, Sir* George Vernon *Knight, was made one of the Barons of the Exchequer.*

Ante 203. Anno 5 Car. Reg. Term. Mich. *Sir* John Walter *was commanded to forbear the exerciſing of his place; yet held the ſame by his Patent, until his death, being upon the* 18 *of* November An. 6. Car. Reg. F. 203.

Ante 211. Anno 7 Car. Reg. Termin. Paſch. *Sir* Hump. Davenport, *one of the Juſtices of the Common Bench, was made chief Baron,* ut ſupra.

In

In eiſdem Anno & Termino, *Sir* James Weſton *Knight, was made one of the Barons of the Exchequer in the place of Sir* G. Vernon, *who was advanced to the Common Bench,* ut ſupra. Ante 211.

Anno 9 Car. Reg. Termino Hillarii, *Sir* James Weſton *departed this life.* Ant. 339.

Anno 10 Car. Reg. Term. Paſch. Rich. Weſton *Serjeant at Law, was made one of the Barons of the Exchequer.* Ibid.

Anno 14 Car. Reg. Richard Weſton *removed, & in Hillary Term,* eodem anno, Ed. Henden *Serjeant at Law, was made one of the Barons of the Exchequer.*

FINIS.

Mantiſſa.

PAg. 181. *The King againſt Sir* John Eliot, Denzill Hollis, *and* Benjamin Valentine. *Nota,* That afterwards, in the Parliament, 17 *Car.* it was reſolved by the Houſe of Commons, That they ſhould have recompence for their Damages, Loſſes, Impriſonments, and ſufferings ſuſteined for the Services to the Common-wealth in the Parliament, 3 *Caroli. Vid. ante fol.* 604. 605. *&c.*

Pag. 296. *Reſolution upon the Caſes of Admiral Juriſdiction. Nota,* Theſe were not Judicial Reſolutions, and therefore not Authentick. *Vide* an Ordinance 12 *Aprilis*, 1647, touching the ſame.

Pag. 524. *The Lord* Sayes *Caſe. Nota,* The Reſolution in Mr. *Hampdens* Caſe there cited, was adjudged to be againſt Law, and repealed by the Statute of 17 *Car. Vide infra, pag.* 601.

4|9|36